85-1423

No. -

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PRIVATE TRUCK COUNCIL OF AMERICA, INC., *et al.*,
Petitioners

v.

RODNEY S. QUINN, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

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48 pp

QUESTIONS PRESENTED

1. Whether 42 U.S.C. §1983 provides redress for injuries caused by violations of the Commerce Clause of the United States Constitution.

2. Whether persons who paid state taxes that were invalid under the Commerce Clause and that were exacted under compulsion of criminal sanctions and forfeiture of the right to do business in the state for non-payment have a right under the United States Constitution to recover such tax payments.

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OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine (App. A, *infra*, 1a - 14a) is not yet reported. The

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[1] Petitioners are Private Truck Council of America, Inc., Circle W Transportation, Inc., and W. H. Christie & Sons, Inc., who brought this action on behalf of themselves and all others similarly situated against the following officials of the State of Maine: Rodney S. Quinn, Secretary of State; Linwood Ross, Deputy Secretary of State, Motor Vehicles; Rodney L. Scribner, Commissioner of Finance and Administration; Dana F. Connors, Commissioner of Transportation; Alan N. Weeks, Chief of the State Police; Arthur A. Stilphen, Commissioner of Public Safety; Samuel Shapiro, Treasurer; and George N. Whalen, Chief Enforcement Officer of the Secretary of State's Office.

decision of the Superior Court of Kennebec County, Maine (App. B, *infra*, 15a - 21a) is not reported.

JURISDICTION

The judgment of the Supreme Judicial Court of Maine (App. A, *infra*, la-14a) was entered on January 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3 provides:

> The Congress shall have Power...
>
> . . .
>
> To regulate Commerce with foreign Nations,

and among the several States, and with the Indian Tribes;

Pertinent provisions of Maine's retaliatory tax statute, 29 M.R.S.A. §2243-C, and related penalty provisions, 17-A M.R.S.A. §§1252; 1301, are set forth in App. C, *infra*, 22a - 24a.

STATEMENT

In this case petitioners filed a class action suit on December 17, 1984 challenging the constitutionality of certain "retaliatory taxes" that the State of Maine imposed on certain interstate motor carriers operating in Maine. The Supreme Judicial Court of Maine held that the challenged taxes violated the Commerce Clause of the United States Constitution but held that petitioners had no right to recover refunds of taxes paid, either under 42 U.S.C. § 1983 or under the Constitution.

A. Maine's Retaliatory Taxes

Maine, like most other states, imposes a variety of fees and taxes on all motor carriers operating in the state, such as fees for identification decals and taxes on the use of fuel in the state. In addition, in 1983, Maine enacted a new tax statute which authorized respondents, various state officials, to levy additional taxes, commonly known as "retaliatory taxes", which are imposed only on carriers operating vehicles in Maine that are registered in certain other states and are not imposed with respect to vehicles registered in Maine 29 M.R.S.A. §2243-C (App. C, *infra*).[2]. The

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[2] In Maine, these taxes are called "reciprocal truck taxes" (App. C, *infra*).

central purpose of Section 2243-C was to retaliate against states imposing so-called "third structure taxes",[3] which certain states impose on all motor carriers operating in those states, including Maine-registered carriers, and to which Maine objects. Section 2243-C carried out this purpose by authorizing respondents to impose "mirror" taxes on carriers registered in those states that operate in Maine.[4] For example, because Arkansas has enacted an annual tax of $175 on every vehicle operating in Arkansas, wherever registered, Section 2243-C authorized respondents to impose the identical tax again on each Arkansas-registered vehicle that comes into Maine (App. C, *infra*). By thus penalizing carriers from third-structure tax states like Arkansas, Maine's legislature hoped to pressure the legislatures of those

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[3] A "third structure tax" is one that is imposed on motor carriers in addition to the more traditional charges states have levied on such carriers, which are registration fees and fuel taxes (so-called "first" and "second structure" taxes). Examples of third structure taxes include ton-mile taxes, which are based on the weight of trucks and the mileage operated in the taxing state, and axle taxes, which impose a flat charge based on the number of axles on each vehicle. These taxes are typically imposed on all carriers, including those based in the taxing state.

[4] Section 2243-C provides in pertinent part:

> So long as another jurisdiction imposes a tax or fee on a class of motor vehicles registered in Maine and traveling in that jurisdiction and that tax or fee is additional to those imposed by Maine upon the same class of motor vehicles not registered in that jurisdiction, the Secretary of State, Commissioner of Finance and Administration and Commissioner of Transportation acting together shall levy the same or substantially the same tax or fee upon the same class of motor vehicles registered in that jurisdiction and traveling in Maine.

states to repeal their third structure taxes or exempt Maine-based carriers from them (App. A, *infra*, 5a).

Respondents implemented Section 2243-C by imposing retaliatory taxes on carriers whose vehicles were registered in 13 states: Arkansas, Colorado, Idaho, Kentucky, Mississippi, Nevada, New Mexico, New York, Ohio, Oregon, Pennsylvania, Virginia and Wyoming (App. A, *infra*, 2a).

Payment of the retaliatory taxes imposed by respondents was a prerequisite to operating in Maine; moreover, the statute provided that any person failing to pay such taxes was guilty of a Class E crime, which carries a penalty of imprisonment for up to six months and a fine of up to $5000 (for organizations) or $500 (for individuals). App. C, infra; 17-A M.R.S.A. §§1252; 1301.

B. Proceedings Below

By December 1984 seven states, including Maine, had enacted and implemented retaliatory motor carrier taxes similar to Maine's.[5] Because these taxes greatly aggravate the already substantial burden of state taxes and fees imposed on interstate motor carriers and because they blatantly discriminate against interstate commerce, petitioner Private Truck Council of America, Inc. and a number of motor carrier companies that had paid these taxes commenced class

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[5] Those states were Maine, New Hampshire, New Jersey, Georgia, Florida, Oklahoma and Nebraska. A number of other states such as Illinois, Indiana, Michigan, Rhode Island and Wisconsin, have enacted statutes authorizing their administrative officials to implement such taxes but they have not yet done so.

action suits in Maine and the other six states in December 1984 and February 1985.[6]

In Maine, as in the other states, petitioners contended that the retaliatory taxes, because they applied only to carriers whose vehicles were registered in other states, violated the Commerce Clause of Article I, Section 8, Clause 3, and the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution. Petitioners sought injunctive and declaratory relief, and also asserted a right to recovery of the taxes paid under 42 U.S.C. §1983 and also directly under the Constitution and sought attorneys' fees under 42 U.S.C. §1988.

Shortly after the complaint was filed in the Superior Court of Kennebec County, Maine, that court ordered all retaliatory taxes paid thenceforth and during the litigation to be held in an escrow fund. Subsequently the Superior Court granted petitioners' motion for summary judgment (App. B, *infra*, 20a). The court held that the taxes imposed under Section 2243-C violated the Commerce Clause because they

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[6] The Private Truck Council of America is a trade association of some 1800 companies that operate trucks and related equipment as private carriers within the scope and in furtherance of their own manufacturing, processing or other businesses, and associated companies. Petitioner Circle W Transportation, Inc. is a subsidiary of Westinghouse Electric Corporation and provides transportation primarily for that company throughout the nation. Petitioner W.H. Christie & Sons, Inc. is an interstate motor carrier company operating as a common carrier under authority issued by the Interstate Commerce Commission. Both Circle W and Christie have operated vehicles registered in Pennsylvania in Maine and have, accordingly, paid retaliatory taxes to Maine under Section 2243-C. Circle W paid $360 for 1984 and Christie paid $540 for 1983 and $25 for 1984.

discriminated on their face against interstate commerce and because the discrimination was not shown to be offset by any complementary taxes imposed solely with respect to vehicles registered in Maine (*id.* at 17a). The court found it unnecessary to address petitioners' additional contentions that the taxes violated the Privileges and Immunities Clause and provisions of the Maine Constitution (*id* at 16a).

With respect to relief, the Superior Court ordered respondents to refund to the class members all monies paid into the court-established escrow fund during the litigation, but denied petitioners' claim for refunds of taxes paid prior to the escrow. The court held that Maine's refund statute did not apply to these taxes and that plaintiffs had no right to refunds under the United States Constitution or Maine common law because the tax payments were made voluntarily (*id.* at 17a -19a). The fact that nonpayment was punishable by fines, up to six months' imprisonment, and loss of the right to operate in the state, did not make the payments involuntary, the court held, because petitioners had not been arrested or subjected to formal criminal proceedings (*id.* at 18a). Finally, the court held that petitioners had no right to refunds under 42 U.S.C. §1983 because the State has sovereign immunity against Section 1983 claims in the absence of a showing "that the tax was purposefully interposed as a barrier to interstate commerce." *Id.* at 19a - 20a.

The Supreme Judicial Court of Maine affirmed the Superior Court's judgment in all respects although on different grounds with respect to petitioners' claim under 42 U.S.C. §1983 (App. A, *infra*). On the merits, the court held that the challenged taxes were discriminatory on their face, were not offset by any

complementary taxes on Maine based carriers, and under this Court's decisions "must be struck down as a violation of the Commerce Clause of the United States Constitution." (*Id.* at 4a). The court noted that "section 2243-C had as its candid purpose coercive retaliation to force the 13 'offending states' to drop the extra tax burdens they impose on Maine trucks." Such a purpose, the court found, is impermissible under the Commerce Clause, citing *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976).[7]

The Supreme Judicial Court also affirmed the denial of petitioners' claim for refunds of taxes paid prior to the establishment of the escrow fund. The court found the state refund statute inapplicable. It also held that taxpayers had no right to recovery under Maine common law, which the court held only allows an action to recover taxes paid "under compulsion", which under the Maine cases requires a showing of "arrests made or threatened, or ... actual or threatened seizure of property" (App. A, *infra*, 7a). The court also held that the same showing must be made by one claiming entitlement under the United States Constitution to recovery of taxes paid under unconstitutional statutes (*id.*).

The Supreme Judicial Court also rejected petitioners' claim under 42 U.S.C. §1983 for recovery of taxes paid and their related claim for attorneys'

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[7] The court also rejected respondents' reliance on a 1972 decision by a New Jersey trial court upholding a similar retaliatory tax imposed by that State. *B & L Motor Freight, Inc. v. Heymann*, 293 A.2d 711 (N.J. Super. Ct. Ch. Div. 1972), *aff'd without opinion*, 311 A.2d 184 (N.J. Super. Ct. App. Div. 1973), *certif. denied*, 317 A. 2d 707 (N.J. 1974), *app. dismissed*, 419 U.S. 1042 (1974).

fees under 42 U.S.C. §1988 because it concluded that state laws that violate the Commerce Clause do not deprive persons adversely affected thereby of any "rights, privileges, or immunities secured by the Constitution". Accordingly, in the court's view, Section 1983 provides no legal or equitable redress for injuries resulting from Commerce Clause violations. App. A, *infra*, 11a - 13a. In support of its conclusion that Section 1983 does not apply to violations of the Commerce Clause, the court relied on an Eighth Circuit decision, *Consolidated Freightways Corp. v. Kassel*, 730 F.2d 1139 (8th Cir.), *cert. denied*, ___ U.S. ___, 105 S.Ct. 126 (1984), although it acknowledged that two other decisions, by the Third Circuit and the United States District Court for the District of Montana, had held to the contrary. *Kennecott Corp. v. Smith*, 637 F.2d 181, 186 n.5 (3d Cir. 1980); *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297, 1304-1305 (D. Mont. 1975), *aff'd*, 425 U.S. 463 (1976). (App. A, *infra*, 12a - 13a).

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Judicial Court of Maine presents two questions of far reaching importance under the Commerce Clause of the United States Constitution: (1) whether 42 U.S.C. §1983 creates a right of action for redress for persons injured by state laws that violate the Commerce Clause and (2) under what circumstances does the United States Constitution itself establish an enforceable right to the return of money exacted by state laws later held to be invalid under the Commerce Clause. As to the first question, there is a direct conflict among the circuits that this Court should resolve. With respect to the

second question, this Court's decisions establish that the Constitution requires states to return money exacted under unconstitutional laws, but the decision of the Supreme Judicial Court of Maine engrafts on that right virtually insurmountable conditions borrowed from that state's common law.

Both questions warrant review and resolution by this Court, which has not squarely addressed them in its previous decisions. They are questions that will recur in almost every case challenging state laws or actions under the Commerce Clause, and are also now likely to arise with respect to a host of other constitutional provisions to which the rationale of the court below could be extended. They are presented, for example, in each of seven suits brought by petitioners against states imposing retaliatory taxes on out-of-state motor carriers, which exact millions of dollars from thousands of interstate motor carriers each year. The questions are of the greatest importance not only to private litigants but also to the free flow of interstate commerce generally. By denying redress to injured parties, the decision below substantially undermines the effectiveness of the Commerce Clause in restraining the tendency of states to raise revenues disproportionately from interstate enterprises that operate in those states but that are domiciled (and vote) elsewhere.

1. The Application Of 42 U.S.C. §1983 To The Commerce Clause Is An Important Issue As To Which There Is A Conflict Among The Circuits

In holding that 42 U.S.C. §1983 does not provide redress for violations of the Commerce Clause, the Supreme Judicial Court of Maine agreed with the decision of the Eighth Circuit in *Consolidated Freight-*

ways Corp. v. Kassel, supra, 730 F. 2d at 1144, which ruled that the Commerce Clause merely "allocates power between the state and federal governments" and does not secure individual rights. The court thus disagreed with the decisions of the Third Circuit in *Kennecott Corp. v. Smith, supra* and the United States District Court for the District of Montana in *Confederated Salish and Kootenai Tribes v. Moe, supra.* In *Kennecott Corp. v. Smith, supra*, the plaintiff contended that a state takeover law violated the Commerce Clause and sued under Section 1983 for an injunction against its enforcement. The Third Circuit held (637 F. 2d at 186 n. 5):

> The present action is properly brought under [42 U.S.C.] § 1983 because it seeks redress for deprivations of constitutional rights secured by the commerce clause and of federal statutory rights protected by the Williams Act. See *Maine v. Thiboutot*, ___U.S. ___, 100 S. Ct. 2502, 65 L.Ed. 2d 555 (1980).

In *Confederated Salish and Kootenai Tribes v. Moe, supra*, the plaintiffs invoked Section 1983 to restrain a state sales tax alleged to contravene the Commerce Clause. Relying on this Court's decision in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972), the court held (392 F. Supp. at 1305):

> We therefore have no difficulty in holding that plaintiffs' alleged violation of Commerce Clause rights is sufficient to state a claim under § 1983.

There is thus a clear conflict among the circuits and other courts on this important issue that should be resolved by this Court.

The decision below and that of the Eighth Circuit in *Consolidated Freightways, Inc. v. Kassel, supra,* are also in conflict with decisions of this Court construing Section 1983. In *Lynch v. Household Finance Corp., supra,* this Court firmly rejected the notion that Section 1983 protects only some but not all of the rights secured by the federal Constitution and laws, holding that Section 1983 embraces "*all* of the Constitution and laws of the United States." 405 U.S. at 549, n. 16 (emphasis supplied). This principle was reaffirmed in *Maine v. Thiboutot,* 448 U.S. 1, 4 (1980), where the Court rejected the claim that Section 1983 "should be limited to some subset of laws" and held that "the plain language of the statute undoubtedly embraces respondents' claim that petitioners violated the Social Security Act." See also *Monell v. New York City Department of Social Services,* 436 U.S. 658, 700-701 (1978).[8]

The conclusion of the court below and of the Eighth Circuit that the Commerce Clause does not establish enforceable personal rights that may be redressed under Section 1983 is also at odds with decisions of this Court applying the Commerce Clause, and it would have anomalous and far reaching consequences. While

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[8] There is no significance to the fact that this Court denied a petition for a writ of certiorari in the *Kassel* case. Apart from the general principle that denials of certiorari do not constitute rulings on the merits, the petition in that case did not squarely present the Section 1983 issues for this Court's review. Instead the petition presented the following two questions for review: "(1) Is there a constitutionally secured right to engage in interstate commerce?" and "(2) Is a state law, which takes property and which the state does not have power to enact, a violation of due process." Petition For A Writ of Certiorari in No. 83-2119, filed June 25, 1984, p. 2.

the underlying purpose of the Commerce Clause is to "create an area of free trade among the several States", *McCleod v. J. E. Dilworth Co.*, 322 U.S. 327, 330-331 (1944), this Court has made clear that it does so by creating personal rights, which individuals may enforce, to be free of discriminatory and excessive taxation and regulatory burdens imposed by state governments. In *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n. 3 (1977), for example, the Court held that certain stock exchanges had standing to challenge a New York tax that discriminated against them and their members, stating (emphasis supplied): "The Exchanges are asserting *their right under the Commerce Clause* to engage in interstate commerce free of discriminatory taxes on their business...." See also *Maryland v. Louisiana*, 451 U.S. 725, 760 (1981) (emphasis supplied), holding that a Louisiana tax on natural gas "is unconstitutional under the Commerce Clause because it unfairly *discriminates against purchasers* of gas moving through Louisiana in interstate commerce."

Contrary to the conclusion of the Supreme Judicial Court of Maine and the Eighth Circuit, there is simply no rational or workable principle upon which constitutional provisions can be divided among those that create "individual rights" on the one hand and those that, in the words of the Eighth Circuit, merely "allocat[e] power between the state and federal governments."[9] If accepted, the rationale of the court below and the Eighth Circuit could be extended to a host of constitutional provisions, including, for example, all

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[9] *Consolidated Freightways Corp. v. Kassel*, *supra*, 730 F. 2d at 1144.

of the restrictions in Article II, Section 10 upon states, such as those prohibiting bills of attainder, ex post facto laws, laws impairing contracts, and duties on exports and imports. Taking this purported distinction to its logical conclusion could even lead to the determination that the First and Fourteenth Amendments create no "individual rights" redressable by Section 1983 because they are phrased in terms of limitations on the powers of the federal and state governments.[10]

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[10] In support of their conclusions that Section 1983 does not apply to Commerce Clause violations, the court below and the Eighth Circuit in *Kassel* mistakenly relied on *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979). *Chapman* did not concern the scope of Section 1983 but rather the significantly narrower language of its jurisdictional statute, 28 U.S.C. §1343(3). In fact, this Court in *Chapman* specifically acknowledged that the broader language of Section 1983 created substantive causes of action for all violations of federal rights, although in some cases those federal rights must be vindicated in state courts because of limits on federal court jurisdiction contained in Section 1343. *Chapman* is not pertinent for the further reason that it did not involve Commerce Clause claims but rather federal statutory claims invoked under the Supremacy Clause.

The Eighth Circuit in *Kassel*, but not the Supreme Judicial Court of Maine in this case, also relied on two other cases that are completely inapposite, *Middlesex County Sewage Authority v. National Sea Clammers Assn.*, 453 U.S. 1 (1981) and *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981). Those cases merely recognized that where a federal statute was not intended to create privately enforceable rights, a private person could not use §1983 derivatively to create such a right. Numerous cases, beginning with *Gibbons v. Ogden*, 22 U.S. 1 (1824), establish that Commerce Clause violations may be redressed by private suits. *Sea Clammers* and *Pennhurst* thus provide no support for the Eighth Circuit's conclusion.

The Section 1983 issue is important. The decision below significantly reduces the protections the Commerce Clause provides to persons engaged in interstate commerce. By denying recovery under Section 1983 of taxes paid, it effectively encourages states to exact unconstitutional taxes by letting them retain any taxes they are able to collect prior to a final judicial order enjoining them prospectively.[11] Furthermore, because of the constitutional and statutory restrictions on federal court jurisdiction in cases challenging state taxes, there is an important need to ensure that Section 1983 is an effective remedy against unconstitutional state taxes in cases brought, as this one was, in state courts. The decision below is one of a number of state court decisions in recent years that have rejected Section 1983 as a basis for such claims, and this issue is a recurring and important one. See, Taylor, *Section 1983 in State Court: A Remedy For Unconstitutional State Taxation*, 95 Yale L.J. 414 (1985).

Another significant effect of the decision is to deny recovery of attorneys' fees from the state under 42

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[11] This can be a significant inducement, as this and other cases brought by petitioners attest. Maine's retaliatory taxes have been in effect since 1983. This suit was filed in December 1984. On January 2, 1985, the superior court ordered all future collections held in escrow. Respondents have stated that as of October 7, 1985 approximately $250,000 in tax collections had been placed in escrow but that Maine had collected approximately $700,000 in retaliatory taxes prior to January 1985. Similarly, retaliatory taxes in the six other states sued by petitioners had been in effect for some time (since 1969 in the case of New Jersey) prior to the filing of those suits. Moreover, in three of those states, Oklahoma, New Jersey and Nebraska, the trial courts denied petitioners' motions that collections made during the litigation be held in escrow.

U.S.C. § 1988.[12] This Court has recognized the importance of Section 1988 in permitting persons effectively to protect and vindicate their constitutional and statutory rights from state infringement. See *Maine v. Thiboutot, supra*, 448 U.S. at 11, noting that "Congress viewed the fees authorized by § 1988 as 'an integral part of the remedies necessary to obtain compliance with § 1983.' S. Rep. No. 94-1011, p. 5 (1976)." See also *Hutto v. Finney*, 437 U.S. 678 (1978). The decision below effectively negates that protection and policy with respect to state violations of the Commerce Clause.

II. The Denial Of Petitioners' Constitutional Claim For Refunds Also Presents An Issue Of General Importance And Is Contrary To This Court's Decisions

In *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930), this Court held: "[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the 14th Amendment." See also *Ward v. Love County*, 253 U.S. 17 (1920), ordering the refund of an unconstitutional county tax even though state law did not permit a refund. Although these cases refer to taxes exacted "by compulsion" (280 U.S. at 369) or "by coercive means" (253 U.S. at 24), the Court has also made clear that such compulsion or coercion may be implied as a matter of law if "serious disadvantages" confront those who do not pay the tax. See *Atchison, T. & S.F. Ry. Co. v. O'Connor*, 223 U.S. 280 (1912), finding implied

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[12] In *Thiboutot v. State*, 405 A. 2d 230 (Me. 1979), the Supreme Judicial Court of Maine held that where, as in that case, plaintiffs properly state a claim under Section 1983, plaintiffs' attorneys are entitled to attorneys' fees under Section 1988.

duress from the imposition of a 10% penalty and forfeiture of the right to do business in the state.

The decision below effectively nullifies those constitutional rights by requiring, as a precondition borrowed from the state's common law, some showing of actual or threatened arrests or seizures of property. Petitioners submit that that conclusion cannot be squared with the decisions of this Court cited above. In this case, persons failing to pay the challenged taxes were subject under Maine law not only to the forfeiture of the right to operate (i.e., to do business) in the State but also to fines of up to $5000 and up to six months' imprisonment. Plainly those consequences amount to "serious disadvantages" within the meaning of *Atchison, supra*, and in view of them there can be no serious question that the taxes were paid "by compulsion" and "by coercive means". If the conclusion is upheld that states may nevertheless deny recovery of taxes paid even in those circumstances, states will be able to erect effectively insurmountable obstacles to the recovery of any money or property that they exact unconstitutionally. That conclusion has the most far reaching implications, and this Court's review is necessary to resolve this important issue of effective constitutional remedies.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. 3997
Law Docket No. Ken-85-278

PRIVATE TRUCK COUNCIL OF AMERICA, INC. *et al.*

v.

SECRETARY OF STATE

Argued November 20, 1985
Decided January 3, 1986

Before McKUSICK, C.J., and NICHOLS, ROBERTS, WATHEN, and SCOLNIK, JJ.

McKUSICK, C.J.

In this class action brought by and on behalf of certain out-of-state truckers, the Superior Court (Kennebec County) agreed with the plaintiff class that Maine's so-called reciprocal truck taxes violate the Commerce Clause of the United States Constitution. The court, however, refused to order any refund of amounts paid on those unconstitutional taxes, except to the extent that the plaintiff class had been protected by an escrow arrangement set up during the pendency of this action, and also denied plaintiffs' request for allowance of attorney fees. Both parties have appealed. Our review reveals no reversible error in any of those rulings.

The statute in question, 29 M.R.S.A. § 2243-C,[1] went into effect on April 24, 1984. P.L. 1983, ch. 818, § 21.

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[1] 29 M.R.S.A. § 2243-C (Supp. 1985-86) reads in full:

> So long as another jurisdiction imposes a tax or fee on a class of motor vehicles registered in Maine and traveling in that juris-

Section 2243-C imposes taxes or fees on all trucks coming into Maine that are registered in states that levy so-called third structure taxes[2] on Maine-registered trucks operated in those states. On November 11, 1984, under the authority of section 2243-C, the Secretary of State and the Commissioner of Transportation, promulgated "Joint Rules Governing Collection of Reciprocal Taxation of Motor Vehicles." Those rules named 13 states whose registered vehicles on traveling into Maine become subject to tax under section 2243-C.[3] The actual tax or fee assessed under sec-

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diction and that tax or fee is additional to those imposed by Maine upon the same class of motor vehicles not registered in that jurisdiction, the Secretary of State, Commissioner of Finance and Administration and Commissioner of Transportation acting together shall levy the same or substantially the same tax or fee upon the same class of motor vehicles registered in that jurisdiction and traveling in Maine.

The Secretary of State, Commissioner of Finance and Administration and Commissioner of Transportation shall jointly promulgate rules for collection of taxes or fees due pursuant to this section, for enforcement of the collection and for otherwise carrying out the purposes of this section. The Secretary of State shall monitor taxes and fees assessed against Maine-registered motor vehicles by other jurisdictions, in order to ensure comparable treatment of foreign-registered motor vehicles traveling in Maine.

Any revenue derived from taxes or fees levied pursuant to this section shall accrue to the Highway Fund.

Any person who fails to pay a tax or fee due pursuant to this section shall be guilty of a Class E crime.

[2]Third structure taxes are so named because they are assessed in addition to registration fees and fuel taxes.

[3]Those 13 states are Arkansas, Colorado, Idaho, Kentucky, Mississippi, Nevada, New York, New Mexico, Pennsylvania, Ohio, Oregon, Virginia, and Wyoming. By way of examples, their third structure taxes imposed on out-of-state trucks include a $.002 per mile vehicle charge and a $.0008 per mile cargo charge (Colorado); a $.0305-.04490 per ton per mile charge (Idaho); a tax calculated as the amount of fuel used x price of fuel x sales tax rate (Mississippi); a flat $20 per trip fee (Nevada); a $36 per axle charge (Pennsylvania); and a $.02 per gallon charge (Virginia). Alternatively, some of these 13 states charge out-of-state trucks a per trip fee ranging up to $40.

tion 2243-C is determined on a state-by-state basis and is designed to mirror exactly the third structure tax that each of the 13 states would assess on a Maine-registered truck traveling within its jurisdiction. For example, since Nevada assesses a flat $20 trip fee on each Maine-registered truck that enters its jurisdiction, section 2243-C authorizes a $20 trip fee on each Nevada truck that enters Maine. Failure to pay the tax or fee imposed under section 2243-C is a Class E crime.

Plaintiffs Private Truck Council of America, Inc., and two out-of-state motor carriers brought the present action seeking declaratory and injunctive relief against enforcement of section 2243-C and refunds of all amounts paid under that section.[4] They named as defendants the Secretary of State and other officials of the State of Maine charged with enforcing the reciprocal truck taxes. For convenience, we will refer to defendants collectively as the State. On January 2, 1985, with the State's consent, the Superior Court ordered the State to place in escrow all moneys thereafter collected under the disputed statute. On June 17, 1985, the Superior Court entered a summary judgment declaring that section 2243-C violated the Commerce Clause of the United States Constitution[5] and therefore was unenforceable. The court, however, denied plaintiffs a refund of any back taxes paid, other than those deposited in the court-ordered escrow fund. Plaintiffs appeal the Superior Court's limitation of the tax refund and its denial of attorney fees. The State cross-appeals, challenging the court's finding of unconstitutionality of the reciprocal truck taxes.

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[4]On June 17, 1985, the Superior Court certified this suit as a class action pursuant to M.R. Civ. P. 23(b)(1)(B) and 23(b)(2). The plaintiff class was defined as "all persons or legal entities subject to the tax denominated as a 'reciprocal tax' assessed pursuant to the provisions of 29 M.R.S.A. § 2243-C."

[5]U.S. Const. art. I, § 8, cl. 3. The Commerce Clause empowers Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. ..."

I. Constitutionality of the "Reciprocal Truck Taxes"

Under the Commerce Clause a state tax on interstate commerce will pass muster only if the tax "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *American Trucking Associations, Inc. v. Quinn,* 437 A.2d 623, 625-26 (Me. 1981) (quoting *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274, 279 (1977)); *see also Maryland v. Louisiana,* 451 U.S. 725, 754 (1981). The Superior Court found that section 2243-C failed to pass the third aspect of this test because on its face it discriminates against interstate commerce.

To determine whether section 2243-C passes the third prong of the *Complete Auto Transit* test, we must assess it "in light of its actual effect considered in conjunction with other provisions of the State's tax scheme," and we must decide whether section 2243-C "will in its practical operation work discrimination against interstate commerce." *Maryland v. Louisiana,* 451 U.S. at 756. A statute's discriminatory effect on interstate commerce may be offset by complementary or offsetting taxes on domestic commerce. *American Trucking,* 437 A.2d at 626-27. In the present case, section 2243-C on its face discriminates against interstate commerce because it levies on certain foreign-registered trucks taxes that Maine does not assess against Maine-registered trucks. Since we are not referred to any statute by which Maine imposes a complementary or compensating tax on its domestic trucks to offset the inherently discriminatory effect of section 2243-C,[6] the reciprocal truck taxes must be struck down as a violation of the Commerce Clause of the United States Constitution.

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[6]Section 2243-C authorizes such an assortment of taxes, varied in nature and amount, that it appears dubious that any one tax imposed on domestic trucks could be tailored to offset every one of the reciprocal taxes imposed upon trucks registered in the 13 states (identified in note 3) that travel in Maine.

We read the decisions of the Supreme Court of the United States[7] to require nothing less, if our nation is to avoid " 'a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329 (1977) (quoting *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)).

The State urges that section 2243-C does not violate the Commerce Clause because the Maine Legislature had no discriminatory purpose in its enactment, but rather intended to promote interstate commerce by attempting "to make treatment of [foreign-registered] motor vehicles in Maine comparable with treatment of similar Maine-registered motor vehicles traveling in those [foreign] vehicles' jurisdictions of registration." L.D. 2412 Statement of Fact (111th Legis. 1984). In other words, section 2243-C had as its candid purpose coercive retaliation to force the 13 "offending" states to drop the extra tax burdens they impose on Maine trucks. This type of legislative purpose has not, however, met with approval before the United States Supreme Court. To the extent, if any, that the 13

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[7]The 1972 decision of a New Jersey trial court upholding a retaliatory truck tax is not persuasive to the contrary, even though an appeal to the United States Supreme Court was dismissed summarily. *B & L Motor Freight, Inc. v. Heymann*, 293 A.2d 711 (N.J. Super. Ct. Ch. Div. 1972), *aff'd without opinion*, 311 A.2d 184 (N.J. Super. Ct. App. Div. 1973), *certif. denied*, 317 A.2d 707 (N.J. 1974), *appeal dismissed*, 419 U.S. 1042 (1974). Summary dispositions by the Supreme Court "do not ... have the same precedential value ... as does an opinion of [the Supreme] Court after briefing and oral argument on the merits." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). The Supreme Court's summary action may mean nothing more than that the one opinion rendered in the New Jersey state court system did not refine the issues with the clarity, precision, and certainty desirable before the highest court undertakes review. *See Rescue Army v. Municipal Court*, 331 U.S. 549, 576 (1947). In any event, any significance accorded the Supreme Court's 1974 summary disposition of *B & L Motor Freight* must yield to supervening "doctrinal developments." *See Hicks v. Miranda*, 422 U.S. 332, 344 (1975). The case at bar is controlled by more recent Supreme Court cases, including those cited in the text of this opinion.

states whose vehicles are currently subject to Maine's reciprocal truck tax are themselves unconstitutionally burdening interstate commerce with their third structure taxes, "the Commerce Clause itself creates the necessary reciprocity: [Maine and its truckers] may pursue their constitutional remedy by suit in state or federal court challenging [those 13 states'] actions as violative of the Commerce Clause," instead of enacting retaliatory taxes. *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976). A state may not violate the Commerce Clause in an attempt through self-help to coerce another state into desisting from a Commerce Clause violation.

There also is no merit in the State's argument that section 2243-C is valid since it discriminates against only some, not all, foreign-registered trucks, i.e., only those trucks registered in those 13 jurisdictions imposing third structure taxes on Maine-registered vehicles that may go into those states. The Supreme Court rejected such an argument in *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27 (1980), when it struck down a Florida statute as violative of the Commerce Clause discriminated against only certain types of out-of-state financial institutions. *Id.* at 40-43. Nothing in the present case suggests a different analysis. Balkanization, even though only partial, is still Balkanization.

Because section 2243-C is discriminatory on its face and the State's scheme for taxing trucks lacks any complementary or offsetting taxes on domestic truckers, the statute must fall as offensive to the Commerce Clause. The Superior Court found no need to reach the alternative grounds upon which plaintiffs argue that the taxes imposed by section 2243-C are unconstitutional, and neither do we.

II. Plaintiffs' Claim for Refund of All Taxes Paid under the Unconstitutional Statute.

Having succeeded in getting the reciprocal truck taxes declared unconstitutional, plaintiffs assert that they are entitled to a refund of *all* moneys paid to the State on those unconstitutional taxes, including those paid prior to

the establishment of the court-ordered escrow account on January 2, 1985. The Superior Court, however, limited their relief to reimbursement of the funds in the escrow account. We agree with the Superior Court's rejection of plaintiffs' claim to any refund of the pre-escrow payments.

Plaintiffs first rely on Maine common law to support their claim for a full refund. Recognizing at least for the purposes of the present case that under Maine common law they are entitled to a refund of previously paid taxes only if they paid them under duress, *see Berry v. Daigle,* 322 A.2d 320, 326 (Me. 1974), plaintiffs contend that the facts here satisfy that duress requirement. They urge that the mere fact that failure to pay the reciprocal truck tax constitutes a Class E crime is enough to invoke the "implied duress" doctrine. *See Atchison, T. & S.F. Ry. v. O'Connor,* 223 U.S. 280, 286 (1912). Maine, however, has never adopted that doctrine, although it was noted in *Berry,* 322 A.2d at 326 n.4. In Maine, without a refund statute, "in the context of taxation, duress arises only in those situations in which taxes are paid to avoid arrest or outright seizure of personal property--in short, when failure to pay produces irreparable injury." *Exxon Corp. v. King,* 351 A.2d 534, 536 (Me. 1976). The record contains no evidence of any arrests made or threatened, or of any actual or threatened seizure of property, because a trucker refused to pay the section 2243-C tax. Therefore, the Superior Court correctly found that the common law of Maine affords no remedy to plaintiffs other than a return of those funds paid into the escrow account on and after January 2, 1985.

Second, plaintiffs urge that federal constitutional law requires that the State disgorge all back taxes paid pursuant to the unconstitutional section 2243-C. To support their theory they cite *Carpenter v. Shaw,* 280 U.S. 363, 369 (1930), and *Ward v. Board of County Commissioners,* 253 U.S. 17, 24 (1920), for the proposition that the fourteenth amendment requires a refund of any unconstitutional tax. Those cases, however, required refund of taxes paid *under compulsion.* Since we have already found that

plaintiffs did not pay the section 2243-C taxes under duress or compulsion, those cases do not aid plaintiffs' position.

Having failed on both their common law and federal constitutional arguments, plaintiffs fall back on a contention that they are entitled to a refund under 36 M.R.S.A. § 152, which in terms relieves the taxpayer from the adverse consequences of paying "any tax":

> A *taxpayer* may pay any *tax,* ... without forfeiting any right to apply for a refund or an abatement or to seek review of the validity of the tax. No such *tax* ... need be paid ... under protest or under duress to entitle the *taxpayer* to apply for a refund or an abatement or to seek review of the validity of the tax.

36 M.R.S.A. § 152 (Supp. 1985-1986) (emphasis added). Analysis of the statutory context of section 152, however, reveals that the truckers who have paid the reciprocal truck tax imposed by 29 M.R.S.A. § 2243-C are not given the benefit of the refund statute.

Section 152, originally enacted as section 6 of title 36 by P.L. 1977, ch. 477, § 1, was reenacted with its present numerical designation by P.L. 1981, ch. 364, § 10, in connection with extensive administrative changes in the tax laws. In the same comprehensive 1981 enactment, *id.* §§ 5, 6, the legislature also prescribed the following definitions of the words "tax" and "taxpayer" as used in title 36:

> As used in this Title, unless the context otherwise indicates, the following terms have the following meanings.
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> ....
>
> 5. Tax. "Tax" means the total amount required to be paid, withheld and paid over, or collected and paid over with respect to estimated or actual tax liability under *this Title,* including any interest or civil penalty relating thereto.

....

7. Taxpayer. "Taxpayer" means any person required to file a return under *this Title* or to pay, withhold and pay over or collect and pay over any tax imposed by *this Title.*

36 M.R.S.A. § 111 (Supp. 1985-1986) (emphasis added).

Plaintiffs urge us to ignore the limiting definitions of "tax" and "taxpayer," and to interpret the words "any tax" in 36 M.R.S.A. § 152 exactly as they would be read if they stood all by themselves. That we cannot do. Section 2243-C did not become effective until April 24, 1984. At that time, as well as at the time plaintiffs paid the taxes due under section 2243-C, the 1981 definitional amendments to title 36 were already in place and therefore plaintiffs were not "taxpayers" paying a "tax" for any purpose of title 36, including 36 M.R.S.A. § 152. The reciprocal truck taxes are not imposed under title 36, but rather under title 29. Thus plaintiffs may not use section 152 as a mechanism for obtaining a refund free of the common law requirement that they demonstrate that they paid the taxes under duress.[8] "In construing a statute our duty is to give effect to the intent of the Legislature as evidenced by the language of the statute. If the meaning of the language is plain, we must interpret the statute to mean exactly what it says." *Concord General Mutual Insurance Co. v. Patrons-Oxford Mutual Insurance Co.*, 411 A.2d 1017, 1020 (Me. 1980). *See also Opinion of the Justices,* 460 A.2d 1341, 1345 (Me. 1982); *National Council on Compensation Insurance v. Superintendent of Insurance,*

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[8]Plaintiffs also contend that they are entitled to receive a refund of taxes paid pursuant to section 2243-C's predecessor statute, 29 M.R.S.A. § 2243(2). Like current section 2243-C, former section 2243(2) authorized reciprocal truck taxes. Plaintiffs, however, are defeated by the same reasoning as applies to section 2243-C, namely, the section 2243(2) taxes did not go into effect until April 1, 1983, P.L. 1983, ch. 94, pt. c, § 9, and were repealed effective April 24, 1984, P.L. 1983, ch. 818, § 20, and at all times during their existence the definitions applicable to title 36 limited the scope of a section 152 refund to taxes assessed under title 36.

481 A.2d 775, 779 (Me. 1984). The language used by the legislature plainly limited the relaxation of the common law refund requirements to taxes imposed under title 36. Because 29 M.R.S.A. § 2243-C does not impose a tax under title 36, plaintiffs do not have a statutory right to recover the taxes they paid thereunder. The Superior Court was correct in ordering a refund of only the moneys held in the escrow account.

III. Plaintiffs' claim for Attorney Fees under Section 1988

Plaintiffs also contend that they are entitled to recover attorney fees from the State pursuant to 42 U.S.C. § 1988, because they brought their action alternatively under 42 U.S.C. § 1983. Section 1988 in the Civil Rights Act provides for the allowance of reasonable attorney fees as part of the costs "[i]n any action or proceeding to enforce a provision of [section 1983]." 42 U.S.C.A. § 1988 (1981). Section 1983 provides in pertinent part:

> Every person who, under color of any statute ... of any State ... subjects, or causes to be subjected, any ... person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. § 1983 (1981). Plaintiffs contend that their class action, which resulted in the judicial declaration that the reciprocal truck taxes violate the Commerce Clause of the United States Constitution, vindicated one of the "rights, privileges or immunities secured by the Constitution" that section 1983 was intended to protect. Therefore, they say, they are entitled to recover their attorney fees under section 1988.[9]

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[9]We assume that plaintiffs are entitled to attorney fees under section 1988 if section 1983 would have been an appropriate basis for relief, even though relief was in fact granted otherwise than under section 1983. *See Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980).

Relying on *Thiboutot v. State*, 405 A.2d 230, 237 (Me. 1979), the Superior Court ruled that plaintiffs' section 1983 claim, as well as their dependent section 1988 claim for attorney fees from the State, was barred by sovereign immunity, there being no evidence of bad faith on the part of defendants in implementing the reciprocal truck tax statute. We need not consider the correctness of that ruling because plaintiffs failed in any event to state a claim for relief cognizable under section 1983. We are convinced that the Congress never intended to make a violation of the Commerce Clause actionable under that section of the Civil Rights Act. The Eighth Circuit has so held in a well-reasoned opinion in *Consolidated Freightways Corp. v. Kassell*, 730 F.2d 1139 (8th Cir.), *cert. denied*, 105 S. Ct. 126 (1984). Although the United States Supreme Court has not addressed this issue so far as the Commerce Clause is concerned, it did hold in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), that the Supremacy Clause does not give rise to a claim of right "secured by the Constitution" within the meaning of 28 U.S.C. § 1343(3), a jurisdictional counterpart to section 1983. *Id.* at 615. *See also Gould, Inc. v. Wisconsin Department of Industry, Labor and Human Relations*, 750 F.2d 608, 616 (7th Cir. 1984) (Supremacy Clause violation does not present a cognizable claim under section 1983). The Eighth Circuit, drawing on the rationale of the Supreme Court's decision in *Chapman*, stated:

> Although the Commerce Clause differs from the Supremacy Clause in that the Commerce Clause is a specific grant of legislative power to Congress, the two clauses are analogous in the sense that both clauses limit the power of a state to interfere with areas of national concern. Just as the Supremacy Clause does not secure rights within the meaning of § 1983, neither does the Commerce Clause.

Consolidated Freightways, 730 F.2d at 1144 (footnotes omitted). We adopt as our own the reasoning of the Eighth Circuit's opinion in *Consolidated Freightways:*

> It is clear from the language employed by the Supreme Court in Commerce Clause cases that the Commerce Clause deals with the relationship between national and state interests, not the protection of individual rights. These decisions are replate with references to the *national* or *federal interest* in preventing the burdensome state regulation of interstate commerce. *See, e.g., Bibb v. Navajo Freight Lines,* 359 U.S. 520, 524, 79 S. Ct. 962, 965, 3 L. Ed. 2d 1003 (1959); *Hood & Sons, Inc. v. DuMond,* 336 U.S. 525, 537-42, 69 S. Ct. 657, 664-67, 93 L. Ed. 865 (1949); *Southern Pacific Co. v. Arizona,* 325 U.S. 761, 775-76, 65 S. Ct. 1515, 1523-24, 89 L. Ed. 1915 (1945).
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> ....
>
> Although individuals are oftentimes benefited through the indirect protection resulting from the limitations placed on the states through the dormant Commerce Clause doctrine, such benefit is not the same thing as a "right" secured by the Constitution within the meaning of § 1983. ...
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> ....
>
> ... To hold that an alleged violation of the Commerce Clause constitutes an action cognizable under § 1983 would ... be an unwarranted extension of the Civil Rights Act. We do not believe that such a cause of action was within the intent of the Congress that enacted the civil rights statutes, nor do we believe that such an interpretation of the scope of § 1983 is mandated by either the language of § 1983 or the nature of the Commerce Clause.

Id. at 1144-47 (emphasis in original) (footnote omitted).

We find unpersuasive, as did the Eighth Circuit, two earlier federal cases stating terse holdings going the other way. *Kennecott Corp. v. Smith,* 637 F.2d 181, 186 n.5 (3rd Cir. 1980); *Confederated Salish and Kotenai Tribes v. Moe,* 392 F. Supp. 1297, 1304-05, (D. Mont. 1975), *aff'd,* 425

U.S. 463 (1976).[10] Neither of those cases analyzed the merits of extending section 1983 to encompass violations of the Commerce Clause, but rather merely relied on generalized statements in Supreme Court cases that did not involve the Commerce Clause issue. *Consolidated Freightways*, 730 F.2d at 1142-43.

The complaint in this class action sought relief directly on the basis that section 2243-C was void because it violated the Commerce Clause; the plaintiff class has prevailed on that claim. In another count, the complaint attempted to state a claim under section 1983 to the effect that "[t]he actions of defendants [in imposing taxes violative of the Commerce Clause] ... deprive plaintiffs of rights secured to them by the United States Constitution." That latter count, however, did not state a cognizable cause of action under section 1983. Consequently, section 1988 never came into play, and the plaintiff class is left with no basis for departing from the American rule that they bear their own attorney fees in the litigation. They cannot recover attorney fees from the State.

The entry is:

Judgment affirmed.

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[10]The Supreme Court in its affirmance did not reach the issue.

All concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are required to notify the Reporter of Decisions, Box 368, Portland, Ma. 04112, of any typographical or other formal errors before the opinion goes to press.

APPENDIX B

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT CIVIL ACTION
Docket No. CV-84-562

PRIVATE TRUCK COUNCIL OF AMERICA, INC., *et al.*,
Individually and On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs

VS.

RODNEY S. QUINN, *et al.*,

Defendants

DECISION AND ORDER

This matter is before the Court on Plaintiffs' Motion for Summary Judgment on their complaint for declaratory judgment and injunctive relief. Plaintiffs seek a judgment that 29 M.R.S.A. § 2243-C is unconstitutional on its face, and they seek a refund of all fees collected pursuant to that law.

Section 2243-C[1] was enacted by P.L. 1983, c. 818, § 21 and became effective April 24, 1984. It is a "reciprocal" tax requiring any foreign-registered truck that uses Maine highways to pay any tax and fee to Maine that a Maine-registered truck would have to pay in the foreign truck's state of registry over and above what a foreign truck would pay in Maine. Truck owners and operators who do not comply with the law may be subject to arrest and prosecution for a Class E crime.

The named plaintiffs are Private Truck Council of America, Inc., an association of truck owners and operators,

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[1] The full text of § 2243-C is included as appendix A to this opinion.

and two trucking companies that operate trucks registered in other states to and through Maine. In an order submitted jointly with this opinion, the matter has been certified as a class action in which Plaintiffs represent all owners and operators of trucks subject to 29 M.R.S.A. § 2243-C.

Plaintiffs' complaint alleges that § 2243-C is invalid because (a) it discriminates against interstate commerce in violation of the Commerce Clause of Article I, section 8, clause 3 of the United States Constitution; (b) it violates the Privileges and Immunities Clause, Article IV, section 2; and (c) it violates the Maine Constitution, Article I, section 6-A.

Finding the reciprocal tax imposed by § 2243-C invalid under the Commerce Clause, the Court does not reach the merits of the other challenges brought by Plaintiffs.

Following *Auto Transit v. Brady*, 451 U.S. 174, 179 (1977) and *Maryland v. Louisiana*, 451 U.S. 715, 754 (1981), the Law Court has stated that "a state tax on interstate commerce will pass constitutional muster only if the tax '[1] is applied to an activity with a substantial nexus with the taxing state, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.' " *American Trucking Associations, Inc. v. Quinn*, 437 A.2d 623, 625-26 (1981). A tax is invalid if it fails to meet any one of the four criteria. *Id.* at 626.

On its face, § 2243-C discriminates against interstate commerce. It is undisputed that, pursuant to rules promulgated under § 2243-C, trucks registered in thirteen states pay taxes to Maine that Maine-registered trucks do not have to pay. The tax imposed by § 2243-C is imperfect even as a "mirror" tax. A true "mirror" tax would require a foreign-registered truck using Maine highways to pay what Maine-registered trucks would have to pay in the foreign truck's state of registry. By contrast, § 2243-C is operative only where a foreign tax "additional to those imposed by Maine" is levied on Maine trucks. Section 2243-

C will never operate to reduce a foreign truck's tax burden, even where that truck's state of registry imposes a smaller tax than Maine imposes on foreign trucks.[2]

Under *American Trucking Associations, Inc. v. Quinn,* 437 A.2d at 626, the discriminatory effect of a state tax on interstate commerce may be offset by a domestic tax not imposed on foreign trucks. An offsetting tax of this sort must be "in some sense equivalent as 'complementary' to the tax under attack." *Id.* There has been no showing that such a tax exists at present in Maine. Because the discrimination against interstate commerce worked by § 246-A is not offset by complementary, domestic taxes, the statute must fall as a violation of the Commerce Clause. *Id.* at 627.

The remaining issue concerns the relief to be accorded Plaintiffs. Plaintiffs argue that they are entitled to the refund of *all* monies paid pursuant to § 2243-C, including those paid to the State prior to the establishment of an escrow account by Order of this Court on January 2, 1985.

An entailment of the common law doctrine of sovereign immunity is that a person who has paid taxes illegally assessed against him has no right to recover them unless he can prove that the payment was involuntary, i.e., that he was compelled to pay by duress of his person, seizure of his property, or to avoid an immediate threat of arrest or seizure. *Berry v. Daigle,* 322 A.2d 320 (Me. 1974). The fact that the payment is made under protest to obtain a license does not raise the external influence to the level of duress. Where there is no threat of immediate irreparable injury, mere protest does not preserve the common law right to recover taxes paid. *Id.* at 326; *Exxon Corp. v. King,* 351 A.2d 534, 536 (Me. 1976).

In the present case, violation of § 2243-C was a Class E crime, carrying with it the possibility of imprisonment

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[2] In this respect, § 2243-C fails in its stated purpose of ensuring that foreign vehicles in Maine receive tax treatment "comparable" to the tax treatment Maine vehicles receive in those states. 29 M.R.S.A. § 2243-C, ¶ 2.

for up to six months. Truck operators were subject to arrest, and trucks, theoretically, could be seized if operated without the tax having been paid. However, the general rule is that the mere existence of a possible criminal sanction, where no formal proceedings have actually been instituted, does not render the payment of a tax involuntary. 72 Am. Jur. 2d, *State and Local Taxation*, § 1105 (1974). In the instant case, there is no suggestion that any taxes for which a refund is claimed were paid upon the State's formal institution of criminal proceedings against a taxpayer.

Plaintiffs also claim statutory entitlement to a refund of taxes paid prior to the establishment of the escrow fund. They argue that the Legislature's enactment of Title 36 M.R.S.A. § 152 removed any requirement that involuntary payment be shown as a prerequisite to the refund of illegally exacted taxes. Section 152 provides:

> A taxpayer may pay any tax . . . without forfeiting any right to apply for a refund or an abatement or to seek review of the validity of the tax. No such tax . . . need be paid, filed or made under protest or under duress to entitle the taxpayer to apply for a refund or an abatement or to seek review of the validity of the tax.

36 M.R.S.A. § 111, the definitional section of Title 36, provides:

> As used in this Title, unless the context otherwise indicates, the following terms have the following meanings.
>
> . . .
>
> 5. Tax. "Tax" means the total amount required to be paid, withheld and paid over, or collected and paid over with respect to estimated or actual tax liability under this Title, including any interest or civil penalty relating thereto.
>
> 7. Taxpayer. "Taxpayer" means any person required to file a return under this Title or to pay,

> withhold and pay over or collect and pay over any tax imposed by this Title.

By definition, § 152, the refund provision of Title 36, applies to taxes assessed and paid under Title 36. This Court does not read § 152 as establishing a right to a refund of taxes paid pursuant to Title 29, such as those paid pursuant to 29 M.R.S.A. § 2243-C.

Finally, Plaintiffs urge that federal law mandates the disgorgement of taxes collected in violation of the Constitution, notwithstanding contrary state law. However, the cases cited by Plaintiffs in support of this proposition reveal a clear pattern: only where a state denies the recovery of unconstitutional taxes paid *under duress or compulsion* does it contravene the Fourteenth Amendment. *See Carpenter v. Shaw*, 280 U.S. 351, 369 (1930) (citing *Ward v. Love County*, 253 U.S. 17 (1920)). *United States v. State Tax Commission of Mississippi*, 645 F.2d 4, 5 (5th Cir. 1981), *cert. denied*, 454 U.S. 896 (1981), also cited by Plaintiffs, involved the retention by a state of a tax illegally assessed against the United States Government. As stated by the Fifth Circuit, "the right of the United States, as sovereign, to recover an illegal tax is in no way dependent on compliance with the provisions of state law." *Id.*

The Court concludes that while the tax pursuant to 29 M.R.S.A. § 2243-C constituted an unconstitutional burden on interstate commerce, only amounts paid subsequent to the establishment of the escrow fund are refundable to Plaintiff.

With respect to Plaintiffs' cause of action against the State pursuant to 42 U.S.C. § 1983, the Law Court has held that a state may "constitutionally interpose [its sovereign] immunity as a bar to a class action brought in a state court under 42 U.S.C. § 1983 to recover the amount of past AFDC underpayments, at least where there is no allegation or evidence that the underpayments were made in bad faith for a racially discriminatory or other consti-

tutionally impermissible purpose." *Thiboutot v. State*, 405 A.2d 230, 237 (Me. 1979).

While the tax under § 2243-C was discriminatory and violative of the Constitution, there is nothing in the record to indicate that the tax was purposefully interposed as a barrier to interstate commerce. If anything, § 2243-C was an unsuccessful attempt to bring a sort of parity to state assessments on interstate trucking. By analogy, *Thiboutot* is authority for the proposition that Plaintiffs may not use § 1983 as a vehicle to recover taxes illegally assessed by Defendants.

Therefore, it is ORDERED, ADJUDGED, and DECLARED and the entry shall be:

1. Plaintiffs' Motion for Summary Judgment is GRANTED. Judgment for Plaintiffs in accordance with paragraphs 2 through 5 of this Order.

2. The taxes and fees authorized by 29 M.R.S.A. § 2243-C are hereby DECLARED to be unconstitutional under the Commerce Clause of Article I, section 8, clause 3 of the United States Constitution, and therefore null and void.

3. Plaintiffs' Motion for Summary Judgment on their claim arising under 42 U.S.C. § 1983 is GRANTED against Plaintiffs. Judgment for Defendants on Plaintiffs' § 1983 claim. Plaintiffs' request for costs and attorneys' fees under 42 U.S.C. §§ 1983, 1988 is DENIED.

4. It is ORDERED that Defendants refund to Plaintiffs, and to all members of the class Plaintiffs represent, all moneys they have paid into the escrow fund pursuant to the January 2, 1985 Order of this Court.

5. It is ORDERED that the costs of this action and reasonable fees of Plaintiffs' attorneys shall be paid to Plaintiffs under the common fund doctrine in an amount agreed to by the parties or, in the absence of such an agreement, in an amount to be determined by future order of this Court upon the filing of an affidavit by Plaintiffs.

Dated: June 17, 1985

/s/ _____
MORTON A. BRODY
Justice, Superior Court

§ 2243-C. Reciprocal taxes or fees on classes of motor vehicles; rules; revenue; violations

So long as another jurisdiction imposes a tax or fee on a class of motor vehicles registered in Maine and traveling in that jurisdiction and that tax or fee is additional to those imposed by Maine upon the same class of motor vehicles not registered in that jurisdiction, the Secretary of State, Commissioner of Finance and Administration and Commissioner of Transportation acting together shall levy the same or substantially the same tax or fee upon the same class of motor vehicles registered in that jurisdiction and traveling in Maine.

The Secretary of State, Commissioner of Finance and Administration and Commissioner of Transportation shall jointly promulgate rules for collection of taxes or fees due pursuant to this section, for enforcement of the collection and for otherwise carrying out the purposes of this section. The Secretary of State shall monitor taxes and fees assessed against Maine-registered motor vehicles by other jurisdictions, in order to ensure comparable treatment of foreign-registered motor vehicles traveling in Maine.

Any revenue derived from taxes or fees levied pursuant to this section shall accrue to the Highway Fund.

Any person who fails to pay a tax or fee due pursuant to this section shall be guilty of a Class E crime.

1983 c. 818, § 21. eff. April 24, 1984.

APPENDIX C

29 M.R.S.A. § 2243-C provides:

§ 2243-C. Reciprocal taxes or fees on classes of motor vehicles; rules; revenue; violations

So long as another jurisdiction imposes a tax or fee on a class of motor vehicles registered in Maine and traveling in that jurisdiction and that tax or fee is additional to those imposed by Maine upon the same class of motor vehicles not registered in that jurisdiction, the Secretary of State, Commissioner of Finance and Administration and Commissioner of Transportation acting together shall levy the same or substantially the same tax or fee upon the same class of motor vehicles registered in that jurisdiction and traveling in Maine.

The Secretary of State, Commissioner of Finance and Administration and Commissioner of Transportation shall jointly promulgate rules for collection of taxes or fees due pursuant to this section, for enforcement of the collection and for otherwise carrying out the purposes of this section. The Secretary of State shall monitor taxes and fees assessed against Maine-registered motor vehicles by other jurisdictions, in order to ensure comparable treatment of foreign-registered motor vehicles traveling in Maine.

Any revenue derived from taxes or fees levied pursuant to this section shall accrue to the Highway Fund.

Any person who fails to pay a tax or fee due pursuant to this section shall be guilty of a Class E crime.

17-A M.R.S.A. § 1252 provides, in pertinent part:

§ 1252. Imprisonment for crimes other than murder

1. In the case of a person convicted of a crime other than murder, the court may sentence to imprisonment for a definite term as provided for in this section, unless the statute which the person is convicted of violating expressly provides that the fine and imprisonment penalties it authorizes may not be suspended, in which case the convicted person shall be sentenced to imprisonment and required

to pay the fine authorized therein. The sentence of the court shall specify the place or places of imprisonment, and the term to be served at each, provided that no person shall be sentenced to imprisonment in the Maine Correctional Center located at South Windham, Maine, for a term in excess of 5 years.

2. The court shall set the term of imprisonment as follows:

. . .

E. In the case of a Class E crime, the court shall set a definite period not to exceed 6 months.

17-A M.R.S.A. § 1301 provides, in pertinent part:

§ 1301. Amounts authorized

1. A natural person who has been convicted of a Class B, Class C, Class D or Class E crime may be sentenced to pay a fine, unless the statute which the person is convicted of violating expressly provides that the fine and imprisonment penalties it authorizes may not be suspended, in which case the convicted person shall be sentenced to the imprisonment and required to pay the fine authorized therein. Subject to such sentences and to section 1302, the fine which shall not exceed:

. . .

C. *$500 for a Class E crime;* and

D. Regardless of the classification of the crime, any higher amount which does not exceed twice the pecuniary gain derived from the crime by the defendant.

. . . . .

3. If the defendant convicted of a crim is an organization and the statute which it is convicted of violating expressly provides that the fine it authorizes may not be suspended, the organization shall be sentenced to pay the fine au-

thorized therein. Otherwise, the maximum allowable fine which such a defendant may be sentenced to pay shall be:

E. $5,000 for a Class D crime or a Class E crime; and

F. Any higher amount which does not exceed twice the pecuniary gain derived from the crime by the convicted organization.

(2)

Supreme Court, U.S.
FILED
APR 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1423

In The
Supreme Court of the United States
October Term, 1985

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al.,
Petitioners,

v.

RODNEY S. QUINN, SECRETARY OF STATE, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

In this case, a trade association of motor carriers, the Private Truck Council of America, and two Pennsylvania-based motor carriers ("Petitioners"), challenged the constitutionality of the Maine reciprocal truck tax, 22 M.R.S.A. § 2243-C. This tax "reciprocates", in that it applies a special tax—called a "third structure" tax—on carriers registered in a foreign state, if the foreign state imposes a third structure tax on Maine-registered carriers. (Third structure taxes are charges other than the traditional registration fees and fuel use taxes). Thirteen states other than Maine impose these third structure taxes; and the taxes take a number of different forms. The Maine reciprocal tax mirrors these taxes, and thus the type of reciprocal tax that Maine imposes on an individual foreign carrier depends on the type of third structure tax that its state of registry extends to Maine carriers. The Maine Secretary of State has adopted regulations implementing § 2243-C for carriers from the thirteen states that impose third structure taxes. (These regulations are reproduced as Appendix A, App. 1-App. 7, *infra.*)

Revenues from Maine's tax are earmarked for the State's Highway Fund, and used for road building, repair and maintenance and highway administration. 29 M.R.S.A. § 2243-C; 23 M.R.S.A. § 1651-53. Besides its fiscal purpose, § 2243-C has the primary regulatory objective of deterring states without third structure taxes from instituting them, and persuading the thirteen states with such taxes either to repeal them or enter into a reciprocal waiver with Maine. Because in its necessary operation, the tax falls only on carriers registered in other states, Petition-

ers challenged § 2243-C as, *inter alia,* a discrimination against interstate commerce and therefore pre-empted by the Commerce Clause, Article I, Sec. 8, Cl. 3 of the Constitution.

Petitioners filed their complaint, styled as a class action, on December 17, 1984, approximately eight months after § 2243-C was enacted. Two days later, they asked the Superior Court either to enjoin further tax collections, or to place the proceeds of collection in escrow *pendente lite* in order to preserve their claim for a refund if they prevailed on their challenge. The latter request was based on the authority of *American Trucking Association v. Quinn,* 437 A.2d 623, 625 (Me. 1981) (*Quinn I*) and *American Trucking Association v. Quinn,* 466 A.2d 1266, 1267 (Me. 1983) (*Quinn II*). The State agreed to the escrow of further tax collections *pendente lite,* recognizing that sovereign immunity would otherwise bar the claim for a refund of taxes paid prior to judgment. By consent of all parties, the Superior Court entered an order for the escrow of further tax collections, for "(t)he express purpose . . . (of) ensur(ing) a refund mechanism if the Court finds that such monies were wrongfully or illegally charged and collected by defendants." (The escrow order of January 2, 1985 is reproduced as Appendix C, App. 18-App. 19, *infra.*)

Some months thereafter, Petitioners moved for summary judgment, arguing that the tax was facially invalid under, *inter alia,* the Commerce Clause. Petitioners also asked for a class-wide refund of all taxes paid, and for attorneys fees, from any "common fund" recovered and/or under 42 U.S.C. § 1988. The State opposed the summary judgment motion on the merits. On the matter of remedy, the State objected to a refund insofar as it em-

braced tax revenues collected prior to the escrow order. The State agreed that an award of attorneys fees from any "common fund" recovered was appropriate if Petitioners prevailed, but the State opposed fees under 42 U.S.C. § 1988.

The Superior Court certified the action as a class action, and granted the motion for summary judgment, finding the statute to be invalid under the Commerce Clause. Pet. for Cert., pp. 16a-17a. The court directed that the escrowed funds be returned to the taxpayers, and that Petitioners' counsel receive their attorneys fees from the funds. Pet. for Cert., p. 20a. The court rejected the prayer for a refund of taxes paid prior to its escrow order,[1] denied the request for § 1988 attorneys fees, and declined to enter an injunction against further enforcement of the tax.[2] Pet. for Cert., p. 20a.

Petitioners appealed the Superior Court's order on these last three points, and the State cross-appealed on the merits. The Supreme Judicial Court of Maine, sitting as the Law Court, affirmed the lower court's decision in all respects. Pet. for Cert., pp. 1a-13a. Mandate has since issued. The case is again before the Superior Court for the determination of a refund procedure and an assessment

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[1] As of October 7, 1985, the escrowed funds amounted to $257,832. Prior to the escrow order, the State had collected $102,794 under the challenged statute. The larger amount—$700,000—referenced in the Petition for Cert., at p. 15, n.11, reflects revenues collected under a former, somewhat similar statute, 1983 Public Laws, Ch. 94, Pt. C, § 9, that had been repealed eight months prior to this suit. The complaint (reproduced as Appendix B, App. 8-App. 17, *infra*) does not challenge or mention this former statute.

[2] The State had represented to the trial court that its officials would abide by any final judgment that declared the reciprocal tax unconstitutional.

of attorneys fees. The State has ceased to solicit tax payments under the reciprocal tax.

REASONS FOR DENYING THE WRIT

I. The Application Of 42 U.S.C. § 1983 To Claims Under The Commerce Clause Is Neither An Issue As To Which There Is A Genuine Conflict Among The Circuits Nor An Important Question Of Law.

Petitioners assert that their Commerce Clause challenge to Maine's reciprocal tax is actionable under 42 U.S.C. § 1983, and that having prevailed on this claim, § 1983 entitles them to a refund of taxes paid prior to the escrow order and attorneys fees under 42 U.S.C. § 1988. Pet. for Cert., p. 15. The decisions of this Court, however, clearly foreclose the claim under § 1983 for the refund of taxes paid prior to the escrow order, sovereign immunity standing as a bar. *Edelman v. Jordan,* 415 U.S. 651, 677 (1974); *Quern v. Jordan,* 440 U.S. 332, 341 (1979). *See Thiboutot v. State,* 405 A.2d 230, 237 (Me. 1979), *affirmed sub nom., Maine v. Thiboutot,* 448 U.S. 1 (1980). Thus, only the matter of attorneys fees under 42 U.S.C. § 1988 turns on the question raised by Petitioners.[3]

The conflict among the circuits on this question is, at best, insubstantial, and certainly not of the type to make this case deserving of further review. To warrant a writ,

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[3] Actually, only the source of the attorneys fees to be paid are at issue. The trial court awarded fees to Petitioners' counsel, directing that they be satisfied out of the proceeds of the escrow fund recovered for the class. Pet. for Cert., p. 20a. If the Petitioners' Commerce Clause claim were actionable under § 1983 and attorneys fees under § 1988 were recoverable, the State would have to pay these fees separately. The litigation at this point is thus a species of what four members of this Court described as "one of the least socially productive types of litigation imaginable." *Hensley v. Eckerhart,* 461 U.S. 424, 442 (1983) (Brennan, J. concurring in part and dissenting in part).

there must be a "real or 'intolerable' conflict on the same matter of law or fact, and not merely an inconsistency in dicta. . . ." R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 4.3 (6th ed. 1986). The conflict here, however, arises principally from a terse remark in a footnote of the Third Circuit's opinion in *Kennecott Corp. v. Smith,* 637 F.2d 181, 186, n.5 (3rd Cir. 1980), stating that claims under Commerce Clause and the Williams Act are actionable under § 1983. There was no considered discussion of the question, the answer being more assumed than held, and the remark was dictum, for the injunction sought in that case was sustainable on grounds other than the § 1983 exception to the Anti-Injunction Act.[4]

By contrast, the decision on which the Maine Supreme Judicial Court relied, *Consolidated Freightways Corp. v. Kassel,* 730 F. 2d 1139, 1144-47 (8th Cir.), *cert. denied* — U.S. —, 105 S.Ct. 126 (1984), exhaustively treated the

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[4] In the other cases cited by Petitioners, *Confederated Salish and Kootenai Tribes v. Moe,* 392 F. Supp. 1297 (D. Mont. 1975), *affirmed on other grounds,* 425 U.S. 463 (1976), an Indian tribe and some of its members challenged a Montana tax partly on Commerce Clause grounds. A three-judge District Court found jurisdiction over the tribal claims under 28 U.S.C. § 1362, and, without further analysis, found jurisdiction over the individual claims under 28 U.S.C. § 1343(3) because the "alleged violation of Commerce Clause rights" stated a claim under § 1983. This Court affirmed the jurisdictional holdings with regard to the tribal claims under § 1362, but found it unnecessary to determine the correctness of the holding that § 1343(3) provided jurisdiction over the individual claims. In a footnote, however, this Court reminded the lower court than in further proceedings the claims of the individual plaintiffs "must be properly grounded jurisdictionally." 425 U.S. at 468-69, n.7 (cit. om.). The lower court's decision, of course, predates this Court's decisions in *Chapman v. Houston Welfare Rts. Org., infra; Pennhurst State School and Hospital v. Haldeman, infra* and *Middlesex Cty. Sew. Auth. v. National Sea Clammers Assn., infra.*

question in light of this Court's pronouncements, first, in *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 612-15 (1979), that claims under the Supremacy Clause do not rise to the level of a claim of "right" "secured by the Constitution", and subsequently, in *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28 (1981) and *Middlesex Cty. Sew. Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 19 (1981), that § 1983 creates a remedy only where the statutory provision on which a claim is founded "secures" a "right". Interpreting § 1983 in light of these decisions and the developing jurisprudence under the Commerce Clause, the Eighth Circuit held that the Commerce Clause "deals with the relationship between state and national interests, not the protection of individual rights," and thus did not confer a right actionable under § 1983. *Consolidated Freightways*, 730 F. 2d at 1144-47.

To our knowledge, no circuit court and no state court of last resort has relied on the dictum in *Kennecott*. By

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[5] As noted above, this Court denied a petition for certiorari in the *Consolidated Freightways* case. — U.S. —, 105 S. Ct. 126 (1984). The petition for certiorari in that case raised the same issue as the instant petition. In particular, Consolidated Freightways argued in its petition that the decisions in *Kennecott Corp. v. Smith* and *Confederated Salish and Kootenai Tribes v. Moe* conflicted with the decision of the Eighth Circuit, and

> thus there exists a conflict among the lower courts as to whether 42 U.S.C. § 1983 applies to a violation of an individual's rights under the Commerce Clause. The decision of the Eighth Circuit is equally, of course, in conflict with the previous statements of this Court describing the right as a Constitutionally secured one.

Petition for a Writ of Certiorari, Dkt. No. 83-2119, at pp. 11-12.

Nothing has transpired since this Court denied certiorari on this question in *Consolidated Freightways* that would warrant a different outcome in this case.

contrast, the decision in *Consolidated Freightways* has been followed by all courts that have subsequently addressed the issue. *J & J Anderson, Inc. v. Town of Erie*, 767 F. 2d 1469, 1476-77 (10th Cir. 1985) (neither Commerce Clause nor Supremacy Clause secures rights actionable under § 1983); *Gould, Inc. v. Wisconsin Dept. of Industry, Labor & Human Relations*, 750 F. 2d 608, 615-16 (7th Cir. 1984), *probable jurisdiction noted on other grounds*, — U.S. —, 105 S.Ct. 2356 (1985) (Supremacy Clause does not secure rights actionable under § 1983); *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 748 (D. Wash. 1985) (Supremacy Clause does not secure rights actionable under § 1983). The asserted "conflict" among the courts, even if it were genuine, is thus of no continuing moment.[6]

II. The Denial Of Refunds Of Taxes Collected Prior To The Escrow Order Does Not Conflict With Decisions Of This Court.

This Court has held that a state may not, consistent with the Fourteenth Amendment, refuse to refund taxes exacted in violation of the laws or Constitution of the

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[6] There is in any event no reason to believe that Congress intended to embrace claims under the Commerce Clause within the ambit of § 1983. As Petitioners note, Pet. For Cert., p. 14, n.10, long before the progenitor of § 1983 was enacted in 1871, private litigants had resort to the courts to assert the claim that state statutes affecting them transgressed the Commerce Clause. *See Passenger Cases* (*Norris v. City of Boston*), 7 How. (48 U.S.) 283, 409-10 (1848); *cf., Brown v. Maryland*, 12 Wheat. (25 U.S.) 213 (1827). There was no need for Congress to create an additional remedy for such claims in the 1871 Civil Rights Act. It is equally unlikely that Congress, in enacting 42 U.S.C. § 1988, "[t]he purpose of [which] is to ensure 'effective access to the judicial process', *Hensley v. Eckerhart*, 461 U.S. at 429, intended to reverse the American rule against fee shifting for cases which historically had "effective access" to the judicial process.

United States *by compulsion. Ward v. Love County,* 253 U.S. 17, 23 (1920); *Carpenter v. Shaw,* 280 U.S. 363, 369 (1930). In this case, the Maine Supreme Judicial Court acknowledged these decisions, and expressly held that Maine common law is consistent with them, the common law allowing a taxpayer to recover taxes exacted under an invalid statute if the taxpayer shows that he paid under compulsion. The court found no evidence of compulsion in this case—no arrest, prosecution or seizure of property had been instituted or threatened—and thus the court denied the claim for refund, insofar as it embraced taxes collected prior to the escrow order. Pet. for Cert., pp. 6a-8a.

Petitioners seek to challenge this finding, arguing that, as a matter of constitutional law, they must be found to have paid the tax under compulsion because § 2243-C authorizes criminal penalties for non-payment.[7] This case, however, does not properly present this issue. Petitioners neither alleged in their complaint nor submitted any evidence that the criminal nature of the author-

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[7] The statute provides that non-payment is a Class E crime. For corporations such as these Petitioners, the maximum penalty for conviction of a class E crime is $5,000. 17 M.R.S.A. § 1301 (1)(E).

Petitioners imply that carriers who do not pay the tax *ipso facto* forfeit their right to do business in the State. Pet. for Cert., p. 17. The implication is not accurate. The regulations speak in terms of vehicles, not corporations who own or lease them. The regulations provide that no vehicle subject to the tax may operate in the state without registering first. App. 3, *infra.* (There is no fee imposed for registering). The operator of the registered vehicle must make a quarterly report and pay the taxes due at the time. App. 6-App. 7. Failure to pay the tax for that vehicle will subject that *vehicle* to cancellation of its registration. App. 4-App. 5.

ized penalties for non-payment influenced their decision to pay the tax before challenging it. (The Amended Complaint, on which this suit proceeded, is reproduced as Appendix B, App. 8-App. 17, *infra.*) There is no allegation or evidence that Petitioners paid under protest. Most significantly, there is neither an allegation nor any proof that Petitioners could not practically have brought their challenge to the state's reciprocal tax prior to making tax payments.[8]

Second, while the Fourteenth Amendment mandates that illegal taxes be refunded to taxpayers who show that they actually paid under compulsion, no decision of this Court holds that as a matter of federal constitutional law compulsion must be implied from the mere possibility of criminal prosecution for non-payment. The version of the implied duress doctrine for which Petitioners contend is a common law notion that some states have embraced while others have not. *See* 72 Am.Jur.2d *State and Local Taxation,* §§ 1094, 1105 (1974). Petitioners argue that this Court adopted some version of the implied duress doctrine as constitutional law in *Atchison, Topeka and Santa Fe Ry. Co. v. O'Connor,* 223 U.S. 280 (1912). But that decision should be understood as resting on the common law, not

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[8] The only record evidence on these points indicates that Petitioners were not influenced to pay the tax by the possible penalties for non-payment, for it appears that the individual class representatives were occasionally operating in Maine without paying the tax beforehand. Affidavit of Carolyn Manson, ¶¶ 8-15. (The Affivadit of Carolyn Manson is reproduced as Appendix D, App. 20-App. 24, *infra*). And the fact that Petitioners made tax payments without protest for over a year before bringing this challenge belies the suggestion that they paid the tax under duress.

the Fourteenth Amendment, having been rendered in the pre-*Erie* period[9] when federal courts applied the general law of their own choosing, not controlling state law.

Moreover, the Court's decision in *Atchison, Topeka & Santa Fe Ry.* presupposed that the taxpayer had no effective remedy prior to paying the tax, the common law at that time precluding injunctions against the enforcement of the tax except in extraordinary circumstances. 223 U.S. at 285. By the time of suit in this case, however, the courts in Maine had allowed a taxpayer without a statutory refund option to preserve a refund claim through the procedure that was used here—an escrow of tax receipts *pendente lite*. *See American Trucking Assn. v. Quinn, supra.* In this case, the State consented to the escrow arrangement. That Petitioners' refund was less than complete is attributable not to the absence of a remedy but to their own delay in bringing suit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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9 *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

APPENDICES

APPENDIX A

DEPARTMENT OF FINANCE AND ADMINISTRATION

DEPARTMENT OF THE SECRETARY OF STATE

Motor Vehicle Division

DEPARTMENT OF TRANSPORTATION

Chapter 150 Joint Rules Governing Collection of Reciprocal Taxation of Motor Vehicles

SUMMARY: This chapter contains provisions setting forth specifically jurisdictions for which reciprocal motor vehicle taxation has been imposed, persons subject to taxation, and the means of collecting and enforcing such taxation.

1. *Computation of Tax*

Taxation imposed pursuant to 29 M.R.S.A. § 2243-C, *enacted by* Public Law Chapter 818 (effective April 24, 1984), shall be calculated by the same methods used in taxed vehicles' jurisdictions of registration. For each such jurisdiction, there follows a general description of the applicable tax. Insofar as practicable, the Secretary of State, with the assistance of the State Tax Assessor and the Department of Transportation, shall use pertinent provisions of the law of these jurisdictions to determine the amount of taxation due, so that that amount will be commensurate with the amount imposed upon Maine-registered vehicles traveling in the appropriate foreign jurisdiction.

Jurisdiction	*Description*
Arkansas	Use Equalization
Colorado	Ton-Mile
Idaho	Weight-distance
Kentucky	Weight-distance
	Fuel surcharge
Mississippi	Fuel surcharge
Nevada	Unladen weight-distance
New Mexico	Weight-distance
New York	Use
Ohio	Axel-mile
Oregon	Weight-mile
Pennsylvania	Axel
Virginia	Fuel surcharge
Wyoming	Ton-mile

2. *Persons Liable to Enroll, Report and Pay Tax*

A. The person in whose name a vehicle is registered for highway use shall be liable to enroll for tax payment, report and pay tax, except in the following cases:

1. When a person operates a vehicle in this State under an operating authority, the holder of the operating authority shall be liable to enroll, report and pay tax.

2. When a for-hire carrier transfers the control and operation of a vehicle to another by written lease, the lessee shall be liable to enroll, report and pay tax.

B. If the holder of an operating authority under subsection (A)(1) or the lessee under subsection (A)(2) fails to enroll, report and pay tax, the person in whose name a vehicle is registered shall be liable to enroll, report and pay tax.

C. If the person in whose name a vehicle is registered for highway use fails to enroll, report and pay tax, any person who operates the vehicle in this State shall be liable to enroll, report and pay tax.

3. *Enrollment; Vehicle Identification Decal*

Before any vehicle subject to a tax under section 1 is operated in this State, the person liable pursuant to section 2 shall enroll for purposes of tax payment and apply for a vehicle identification decal. Enrollment and application shall be made simultaneously on a form and in a manner prescribed by the Secretary of State and shall in every instance include furnishing the vehicle identification number (VIN) and whatever other information the Secretary of State deems necessary. Upon acceptance of an enrollment and application, the Secretary of State shall issue an identification decal for each enrolled vehicle.

Enrollments and vehicle identification decals shall be valid until December 31st next following the date of issuance. During the period of enrollment, an identification decal shall be affixed to the exterior of an enrolled vehicle in a location and manner the Secretary of State shall specify.

4. *Cancellation of Enrollment*

Notwithstanding the availability of any other enforcement authority, the Secretary of State may cancel the enrollment pursuant to section 3 of a motor vehicle in any of the following circumstances:

A. Failure to file a report with payment within thirty (30) days after the due date pursuant to

section 6. The Secretary of State shall mail the person liable for the tax a written notice allowing fifteen (15) additional days after such mailing for reporting and payment.

B. Failure to pay an additional sum determined due by the Secretary of State pursuant to section 6. The Secretary of State shall mail the person liable for such sum a second notice or reminder allowing fifteen (15) additional days after such mailing for payment.

C. Failure to produce records for examination or audit pursuant to section 6.

In cases under section 6 for which vehicle fleet reporting has been allowed, the Secretary of State may cancel enrollment for all vehicles in a fleet when there has been a failure to file a report or make payment.

Cancellation of any vehicle's enrollment pursuant to this section shall require re-enrollment, re-application for a vehicle identification decal, and payment of any tax due pursuant to 29 M.R.S.A. § 2243-C and these rules, before that vehicle is operated in this State.

5. *Records*

Every person liable pursuant to section 2 must maintain an accurate record of all operations of taxed vehicles in this State. This record shall be in a form consistent with the record-keeping requirements imposed by the law of such vehicle's jurisdiction of registration upon Maine-registered vehicles traveling therein. Such records shall be maintained for a period of three (3) years

or such longer time as the Secretary of State may require. Such records shall be subject to audit and examination within or outside the State by the Secretary of State or the Secretary of State's designee and must be produced no later than thirty (30) days after a request for production for audit or examination.

6. *Reports; Payment*

Each person subject to a tax under section 1, shall, not later than the last day of April, July, October, and January, file with the Secretary of State, on forms prescribed by the Secretary of State, a report which shall include a computation of tax due. The tax is due at the time the report is required to be filed and shall be remitted to the Secretary of State for deposit in the State Highway Fund. Regardless of whether any tax is due, a report shall be filed for every enrolled vehicle, except that a report for a vehicle fleet may be filed in instances for which the Secretary of State deems such information sufficient. The Secretary of State may deem vehicle fleet statistics to be sufficient in instances in which such information would be sufficient to satisfy comparable reporting requirements of the jurisdiction of vehicle registration.

When an election as to method of tax payment is available in accordance with the Secretary of State's determinations pursuant to section 1, such election with the first report for a vehicle shall control subsequent reports for an enrollment period.

If, subsequent to a payment of tax, the Secretary of State determines that an additional sum is due, the Sec-

retary of State shall by written notice demand payment of such amount within thirty (30) days.

If, after an audit or examination of records pursuant to section 5, the Secretary of State determines that an additional tax payment is due, the Secretary of State shall by written notice demand payment of such amount within thirty (30) days.

7. *Report to Legislature*

Prior to the 31st day of January of each year, the Department of Finance and Administration, Department of the Secretary of State, and Department of Transportation shall jointly file an annual report with Chairpersons of the Legislature's Committees on Taxation and Transportation. The report shall summarize activity by these departments in carrying out the purposes of 29 M.R.S.A. § 2243-C during the previous calendar year, and it shall include a listing of jurisdictions for which a tax is applicable and an accounting of revenues raised and expenditures made.

BASIS STATEMENT: The Department of Finance and Administration, Department of the Secretary of State, and Department of Transportation adopt the foregoing rules pursuant to the Legislative directive of 29 M.R.S.A. § 2243-C, *enacted by* Public Law Chapter 818 (effective April 24, 1984). Chapter 818 established third structure reciprocal taxation for motor vehicles. These rules enumerate the jurisdictions for which this taxation is effective; require reference to those jurisdictions taxing authority to determine taxation imposed by Maine; clarify what persons are responsible for paying this tax; and out-

line the procedure for enrolling for payment, reporting, and payment by responsible persons.

In response to the Notice of Rulemaking Proposal published in newspapers throughout the State and mailed to specific interested parties, the Departments received a comment from William S. Fulcher, Director of the Motor Carrier Division of the State Corporation Commission, Commonwealth of Virgina, discussing the object of Virginia's fuel surcharge. The Departments determined that the information provided by Mr. Fulcher was not inconsistent with the Rules as proposed.

On advice of the Attorney General, the Departments deleted original section 7 from the Rules and renumbered remaining sections appropriately, in order to avoid conflict with case law regarding tax refunds.

Authority: 29 M.R.S.A. § 2243-C

Effective Date: November 11, 1984

APPENDIX B

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.

PRIVATE TRUCK COUNCIL OF AMERICA, INC.,

and

CIRCLE W TRANSPORTATION, INC.

and

W. H. CHRISTIE & SONS, INC.,
Individually and on Behalf of Themselves and
and All Others Similarly Situated,

Plaintiffs

v.

RODNEY S. QUINN, Individually and as
Secretary of State,

and

LINWOOD ROSS, Individually and as Deputy
Secretary of State, Motor Vehicles,

and

RODNEY L. SCRIBNER, Individually and as
Commissioner of Finance and Administration,

and

DANA F. CONNORS, Individually and as
Commissioner of Transportation,

and

ALAN N. WEEKS, Individually and as Chief of
the State Police for the State of Maine,

and

ARTHUR A. STILPHEN, Individually and as
Commissioner of Public Safety for the State of Maine,

and

SAMUEL SHAPIRO, Individually and as Treasurer for the State of Maine,

and

GEORGE N. WHALEN, Individually and as Chief Enforcement Officer of the Secretary of State's Office for the State of Maine,

Defendants

FIRST AMENDED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs, on behalf of themselves and all others similarly situated, hereby complain against defendants as follows:

1. In this class action, plaintiffs seek declaratory and injunctive relief and refunds of unlawfully exacted fees and taxes on behalf of themselves and all others similarly situated. Plaintiffs challenge the lawfulness of 29 M.R.S.A. § 2243-C (hereinafter "Section 2243-C"), under which the defendants have imposed "retaliatory" taxes and fees on motor carriers registered in other states. Because these taxes and fees are not imposed on motor carriers registered in Maine, and because they vary in amount according to state of vehicle registration, plaintiffs contend that they discriminate against interstate commerce, and otherwise violate plaintiffs' rights under the Commerce Clause, Article I, Section 8, Clause 3, of the United States Constitution; the Privileges and Immunities Clause of Article IV, Section 2, Clause 1 of the United States Constitution; Article I, Section 6-A of the Maine Constitution; and Section 1983 of Title 42 of the U.S. Code.

PARTIES

2. Plaintiff Private Truck Council of America, Inc. (PTCA), is a nonprofit business association incorporated under the laws of New York State. It has its principal place of business in Washington, D.C. PTCA is comprised of over 1,800 companies presently operating trucks and related equipment as private carriers within the scope and in furtherance of their own manufacturing, processing or other businesses, and associated companies. A large number of PTCA's member companies, operating thousands of vehicles in interstate commerce through the state of Maine, register their vehicles in states against which Maine retaliates under the authority contained in Section 2243-C. As such, these companies have been or will be required to pay the retaliatory taxes and fees imposed by the defendants.

3. Plaintiff Circle W Transportation, Inc., a wholly-owned subsidiary of Westinghouse Electric Corporation, is a Delaware corporation with its principal place of business in North Huntingdon, Pennsylvania. It operates 15 vehicles, all of which are duly authorized to operate in the State of Maine. Those vehicles are registered in Pennsylvania and are therefore subject to the retaliatory taxes and fees imposed pursuant to Section 2243-C.

4. Plaintiff W. H. Christie & Sons, Inc. is a New York corporation with its principal place of business in Knox, Pennsylvania. Its vehicles are registered in Pennsylvania. It operates 25 vehicles, all of which are duly authorized to operate through the State of Maine, and is therefore liable for the retalitory tax imposed under Section 2243-C.

5. Defendant Rodney S. Quinn is the Main Secretary of State. Defendant Rodney L. Scribner is the Maine Commissioner of Finance and Administration. Defendant Dana F. Connors is the Maine Commissioner of Transportation. Defendant Alan N. Weeks is the Chief of the State Police for the State of Maine. Defendant Arthur A. Stilphen is the Commissioner of Public Safety for the State of Maine. Defendant George N. Whalen is the Chief Enforcement Officer of the Secretary of State's Office for the State of Maine. These defendants are the State officials who have authority, pursuant to 29 M.R.S.A. § 2243-C, to adopt rules and regulations implementing the retaliatory taxes and fees authorized in Section 2243-C, and to assess, collect, and enforce those retaliatory taxes and fees.

6. Defendant Samuel Shapiro is the Treasurer for the State of Maine. It is the State Treasurer who administers the State Highway Fund, into which the proceeds of the retaliatory taxes and fees imposed under Section 2243-C are deposited.

THE CLASS

7. Pursuant to Rule 23 of the Main Rules of Civil Procedure, plaintiffs bring this action on behalf of themselves and all other motor carriers which have operated or will operate vehicles through the State of Maine which are registered in states against which Maine retaliates pursuant to Section 2243-C, and which therefore have paid or will be required to pay the retaliatory taxes and fees imposed under that section. The parties comprising the plaintiff class include hundreds of interstate motor carriers and thus are so numerous as to make joinder

impracticable. The questions of law and fact are common to all members of the class and the plaintiffs will fairly and adequately represent the interests of all class members. Moreover, separate actions by individual members of the class would create the risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications, and the defendants have acted on grounds generally applicable to the class, making appropriate final declaratory and corresponding injunctive relief with respect to the class as a whole.

JURISDICTION

8. This Court has jurisdiction over this action under 4 M.R.S.A. § 105 and 14 M.R.S.A. § 5953.

FACTS

9. The State of Maine imposes several taxes and fees on motor carriers which operate within the State of Maine. Most of those are paid by all motor carriers which use the State's roads regardless of their state of registration. For example, Maine requires all carriers using its highways to obtain a fuel use identification decal for a fee of $15 per year. 29 M.R.S.A. § 246-A. Maine also imposes a tax of 14 cents per gallon on the consumption of motor fuel within the State. This tax is based on the percentage of a carrier's mileage in Maine and the amount of fuel consumed within the State. The fuel tax is paid by all motor carriers, including Maine-based carriers, regardless of their state of registration.

10. In addition to these taxes, the Maine Legislature recently amended the Main Motor Vehicle Code by adding a new tax solely on nonresident motor carriers as follows:

> So long as another jurisdiction imposes a tax or fee on a class of motor vehicles registered in Maine and traveling in that jurisdiction and that tax or fee is additional to those imposed by Maine upon the same class of motor vehicles but registered in that jurisdiction, the Secretary of State, Commissioner of Finance and Administration and Commissioner of Transportation acting together shall levy the same or substantially the same tax or fee upon the same class of motor vehicles registered in that jurisdiction and traveling in Maine.

29 M.R.S.A. § 2243-C.

11. Section 2243-C authorizes the defendants to monitor the taxes imposed on Maine carriers by other states and to adopt rules and regulations implementing retaliatory taxes and fees against carriers from other states as they see fit. The statute provides that the proceeds of the retaliatory taxes and fees collected under Section 2243-C shall be deposited in the State Highway Fund. The statute further provides that any person who fails to pay a tax or fee imposed under Section 2243-C shall be guilty of a Class E crime.

12. The defendants have already implemented a retaliatory tax of $36 per axle on vehicles registered in Pennsylvania, which many Pennsylvania carriers have already paid. In addition, beginning on January 1, 1985, the defendants will implement Section 2243-C by requiring nonresident motor carriers from a total of 13 states to pay retaliatory taxes and fees. The amounts of these fees and taxes range from $.02 per gallon of fuel consumed in

Maine for carriers whose vehicles are registered in Virginia, to $175 annually for carriers whose vehicles are registered in Arkansas. Nonresident carriers are required to pay these fees on a quarterly basis, except carriers with vehicles registered in Pennsylvania and Arkansas, which pay on an annual basis, and carriers with vehicles registered in New Mexico and Oregon, which are required to pay each time one of their vehicles enters the State.

13. Motor carriers whose vehicles are registered in the State of Maine pay no fees or taxes pursuant to Section 2243-C for their use of the State roads.

14. Plaintiff Circle W Transportation, Inc., many of whose vehicles are registered in Pennsylvania, operates in Maine and is subject to the retaliatory taxes imposed under Section 2243-C.

15. Plaintiff W. H. Christie & Sons, Inc., whose vehicles are registered in Pennsylvania, paid retaliatory taxes of $25 for the year 1984 pursuant to Section 2243-C. For the year 1983, W. H. Christie paid a total of $540 in retaliatory taxes pursuant to Section 2243-C. In addition, W. H. Christie continues to operate in Maine and thus will continue to be subject to the retaliatory tax imposed by Section 2243-C.

COUNT I

Unlawful Burden On Interstate Commerce

16. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

17. The retaliatory taxes and fees imposed on plaintiffs and the plaintiff class pursuant to Section 2243-C constitute an unlawful burden on interstate commerce in violation of the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution because they are imposed only on motor carriers whose vehicles are registered outside the State of Maine, while no comparable tax or fee is imposed on carriers whose vehicles are registered in the State of Maine. As such, Maine by its taxing scheme favors domestic enterprises over enterprises from other states. Maine's retaliatory taxes and fees further impose an unlawful burden on interstate commerce because they vary in amount depending on the particular state of vehicle registration. On their face, therefore, the taxes and fees discriminate against interstate commerce. Moreover, the amount of the taxes and fees does not bear a reasonable relationship to the services provided by the State in connection therewith.

COUNT II

Denial of Privileges and Immunities

18. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

19. The retaliatory taxes and fees imposed pursuant to Section 2243-C constitute a denial of the privileges and immunities of plaintiffs and the plaintiff class, whose vehicles are registered outside the State of Maine, because the taxes and fees are imposed on them solely because of their residence in another state. No comparable tax or fee is imposed upon residents of Maine. Accordingly, these

taxes discriminate against nonresidents in violation of the Privileges and Immunities Clause of Article IV, Section 2, Clause 1, of the United States Constitution.

COUNT III

Maine Constitution

20. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

21. The actions or threatened actions of defendants set out above are or will deprive plaintiffs of life, liberty or property without due process of law, or deny plaintiffs the equal protection of the laws, in violation of Article I, Section 6-A of the Constitution of the State of Maine.

COUNT IV

42 U.S.C. § 1983

22. Plaintiffs repeat and reallege the allegations contained in paragraphs 1 through 15 as if fully set forth herein.

23. The actions of defendants set forth in Counts I and II above have been and will continue to be taken under color of state law, custom and usage and threaten to deprive plaintiffs of rights secured to them by the United States Constitution. Defendants are therefore liable to plaintiffs pursuant to 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court grant them:

(a) A declaratory judgment pursuant to 14 M.R.S.A. § 5951 *et seq.* declaring that the retaliatory taxes and fees authorized by 29 M.R.S.A. § 2243-C violate the United States Constitution, the Maine Constitution, and federal law and are therefore null and void;

(b) A permanent injunction enjoining the defendants from assessing or collecting retaliatory taxes and fees on nonresident motor carriers pursuant to 29 M.R.S.A. § 2243-C;

(c) Refunds of all retaliatory taxes and fees collected by the defendants prior to the effectiveness of this Court's judgment, with interest;

(d) Attorneys' fees and costs of this action; and

(e) Such other and further relief as This Court may deem just.

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Dated: January 21, 1985

APPENDIX C

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-84-562

PRIVATE TRUCK COUNCIL OF AMERICA. INC., et al

Plaintiffs

v.

RODNEY S. QUINN, et al

Defendants

ORDER FOR ESCROW OF FUNDS

This matter came before the Court on plaintiffs' motion for a preliminary injunction filed December 19, 1984. In support of their motion, plaintiffs filed a memorandum of law aand proposed Order for escrow of funds. On December 20, 1984, a hearing was held on plaintiffs' motion, and the parties appeared through counsel. Defendants objected to the notice of hearing. The Court allowed defendants until January 3, 1985 to respond to plaintiffs' motion.

Following the above notice, hearing, and objection of defendants, and with consent of the parties, the Court hereby ORDERS as follows:

1. All defendants, and all agents or other persons acting under defendants' direction, supervision, or control, are ordered to deposit into the escrow fund established hereunder all monies hereafter collected or received pursuant to Title 29 M.R.S.A. § 2243-C. At all times such monies collected or received shall be handled in a

manner which allows them to be identified as escrow fund monies and at no time shall such monies become a part of or deposited in the State Treasury. In collecting, receiving, or otherwise dealing with such monies, all defendants, and all agents or other persons acting under such defendants' direction, supervision, or control, shall be deemed to be acting pursuant to this Order and under the Court's jurisdiction. The express purpose of this provision of the Order is to ensure a refund mechanism if the Court finds that such monies were wrongfully or illegally charged and collected by defendants.

2. The defendant Mr. Samuel Shapiro, Treasurer for the State of Maine, is hereby appointed as escrow agent responsible for administering the escrow fund established hereunder.

3. The defendant escrow agent shall maintain adequate records which identify, by name, address, and dates and amounts of monies paid, all persons from whom monies have been received or collected for deposit in the escrow fund. Such records shall be made available to plaintiffs upon reasonable notice.

4. The defendant escrow agent shall invest all such escrow funds, and income accrued thereon, at commercially reasonable rates in a commercially reasonable and prudent manner.

5. All such monies and income earned thereon shall be held in escrow until further Order of this Court.

Dated: January 2, 1985

/s/ Morton Brody
Justice, Superior Court

A TRUE COPY: ATTEST

/s/ Pearl Valerie Page
Clerk of Courts

APPENDIX D

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-84-562

PRIVATE TRUCK COUNCIL OF AMERICA, INC., et al.

Plaintiffs

v.

RODNEY S. QUINN, Individually and as Secretary of State, et al.

Defendants

AFFIDAVIT OF CAROLYN MANSON

Carolyn Manson, having been sworn, now states under oath:

1. I am over 21 years of age and competent to testify to the matters set forth below. I make this affidavit from personal knowledge.

2. I currently serve as the division chief for the Division of Commercial Vehicle and Reciprocity of the Division of Motor Vehicles within the State Department for the State of Maine. The Division supervises the administration of fuel tax decals, commercial vehicle permits, and other road use fees such as that under challenge in this litigation, 29 M.R.S.A. § 2243-C.

3. The State of Maine imposes three types of fees and taxes on motor carriers, as described below.

4. First, the State imposes a registration fee that varies in amount with the size of the truck. *See* 29

M.R.S.A §§ 242-246. While the registration fee provisions by their terms apply to both in-state and out-of-state trucks, the State has separately negotiated reciprocal agreements with 46 states (Arizona, Hawaii and New Mexico excepted) waiving registration fees for trucks registered in these states in return for similar waiver of fees for Maine registered truckers.

5. Second, the State, through the Bureau of Taxation, Department of Finance and Administration, imposes a fuel tax under Title 36, Chapters 453, 457, 459 and 463. This tax is based on the number of gallons consumed by motor carriers as they operate on Maine highways. To implement this tax the State requires carriers to purchase annually a fuel use identification decal for $15.00, for each vehicle traveling on Maine highways. 29 M.R.S.A. § 246-A. Carriers are also required to report their fuel usage on a quarterly basis and pay installments toward the tax due at that time. Occasional trippers may purchase a five-day trip permit for $5.00, in lieu of purchasing an annual decal and reporting taxes quarterly.

6. Third, the State imposes a reciprocal or "mirror" tax or fee on motor carriers registered in jurisdictions that impose taxes or fees other than registration fees and fuel taxes—so-called "third structure" taxes or fees—on Maine-registered vehicles. This reciprocal tax, codified at 29 M.R.S.A. § 2243-C, was first imposed in 1983, and through 1984 was imposed only on Pennsylvania-registered carriers. Under this tax, Pennsylvania carriers must pay an annual tax of $36.00 per axle per vehicle operating in Maine, or alternatively, $25.00 for a five-day trip permit.

7. As a result of regulations promulgated in November 1984, effective January 1, 1985 the State now imposes or will impose reciprocal taxes and fees on trucks registered in 13 states. The tax in each case mirrors the so-called third structure tax which the state imposes. Most of the mirror taxes are based on truck weight or distance traveled within Maine or some combination thereof, and are paid on a quarterly basis. The installments for these weight/distance taxes will not be due until April 1, 1985. In two cases, for Pennsylvania- and Arkansas-registered carriers, the tax is a single fee per truck per annum due January 1, 1985. For the 1985 tax year, the State has thus far collected annual reciprocal taxes and fees only from Pennsylvania and Arkansas based truckers, and trip fees from Oregon carriers.

8. The Division of Commercial Vehicle and Reciprocity, in the regular course of its business, maintains records showing a carrier's purchase of fuel use identification decals or five-day trip permits under the fuel tax, as well as records showing the payment of reciprocal taxes. I have personally reviewed those records as they relate to Plaintiffs W. H. Christie & Sons, Inc. ("Christie") and Circle W ("Circle W") Transportation Co., Inc.

9. Division records pertaining to Christie show that for the year 1983, Christie purchased 13 fuel use identification decals and 5 five-day trip permits under the fuel tax. Division records show, however, that Christie paid the reciprocal tax for no more than five of its vehicles. In my experience, out-of-state carriers purchase fuel use identification decals only when they use or expect to use trucks within Maine. Based on the discrepancy between fuel decals and reciprocal taxes, I have preliminarily concluded

that in 1983 Christie incurred but did not pay reciprocal taxes due on some of its vehicles.

10. In 1984, according to Division records, Christie purchased eight fuel use identification decals and one five-day trip permit under the fuel use tax. However, Christie paid no annual reciprocal tax and paid for only one five-day permit under the reciprocal tax. Again, I preliminarily conclude from this discrepancy that in 1984 Christie incurred but did not pay reciprocal taxes due on its vehicles.

11. To date, the Division has not received any fuel decal or reciprocal tax payments from Christie for the 1985 calendar year.

12. Concerning Plaintiff Circle W, Division records reveal that Circle W paid neither fuel decal fees nor reciprocal taxes to the State in 1983.

13. In 1984, Circle W purchased 33 fuel use identification decals for its vehicles, but paid reciprocal taxes for only two of its vehicles. Based on this discrepancy, I conclude preliminarily that Circle W incurred but did not pay reciprocal taxes due and owing for 1984.

14. For calendar year 1985, Circle W has purchased 20 fuel use identification decals, but has not paid reciprocal tax. Again, this suggests that in 1985 Circle W has incurred but has not paid reciprocal taxes.

15. As noted above, the conclusions expressed are preliminary. It is possible that in the years in question both Christie and Circle W purchased more fuel decals than were required for its vehicles, and did not actually operate vehicles in Maine beyond that indicated by its reciprocal tax payments. I am informed by counsel that Defendants

through discovery have sought information from the Plaintiffs on deliveries and pick-ups within the State of Maine during 1983 and 1984. This information may be helpful in reaching a definitive conclusion as to whether Circle W and Christie have failed to pay reciprocal taxes due and owing to the State.

Dated: February 25, 1985.

/s/ Carolyn Manson

Subscribed and sworn to before me this 25th day of February, 1985.

/s/ Madeleine Pomerleau
Notary Public

Supreme Court, U.S.
FILED
APR 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1423

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

PRIVATE TRUCK COUNCIL OF AMERICA, INC., *et al.*,
Petitioners

v.

RODNEY S. QUINN, *et al.*

On Petition For A Writ Of Certiorari To The Supreme Judicial Court Of Maine

REPLY BRIEF OF PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1423

PRIVATE TRUCK COUNCIL OF AMERICA, INC., *et al.*,
Petitioners

v.

RODNEY S. QUINN, *et al.*

On Petition for a Writ of Certiorari to the Supreme Judicial Court of Maine

---

REPLY BRIEF OF PETITIONERS

Respondents oppose the petition for a writ of certiorari principally on three grounds. First, they contend that petitioners' claim under 42 U.S.C. §1983 for refunds of unconstitutional taxes paid is foreclosed by prior decisions of this Court assertedly holding states immune from such claims under the Eleventh Amendment (Br. in Opp. at 4). Second, respondents claim that there is no "genuine" conflict among the circuits over the application of Section 1983 to Commerce Clause violations because the decision of the United States Court of Appeals for the Third Circuit on this issue was, respondents assert, only dictum (Br.

in Opp. at 5). Third, they claim that when this Court in *Atchison T. & S. F. Ry. v. O'Connor*, 223 U.S. 280 (1912) held that sanctions for non-payment of a tax may imply its payment under duress for purposes of a constitutional entitlement to a refund, it was merely making common law, which each state is free to disregard.[1]

As we discuss below, each of these contentions is incorrect. Contrary to respondents' assertions, the issues presented by the petition, which concern the application of 42 U.S.C. §1983 to Commerce Clause violations and the scope of constitutional remedies for unconstitutional taxes, are important and recurring and involve a direct conflict among the circuits. This Court's review is clearly warranted.

I. States Have No Immunity From A Monetary Claim Under Section 1983 Brought In State Court

Respondents erroneously contend that petitioners' claim under 42 U.S.C. §1983 for the refund of taxes paid prior to filing suit is foreclosed by decisions of this Court assertedly holding that states have sovereign immunity from such claims, citing *Edelman v. Jordan*, 415 U.S. 651 (1974) and *Quern v. Jordan*, 440 U.S. 332 (1979). Accordingly, respondents claim, only attorneys' fees under 42 U.S.C. §1988 turn on the §1983 question presented by petitioners.

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[1] It is noteworthy that respondents have not cross-petitioned for a writ of certiorari to review that portion of the Maine court's opinion holding the challenged retaliatory taxes unconstitutional under the Commerce Clause. Thus, respondents do not in this Court dispute the determination that those taxes are unconstitutional, but simply seek to retain the fruits of the State's unconstitutional exaction.

Respondents are incorrect. In *Edelman v. Jordan, supra*, and *Quern v. Jordan, supra*, this Court only held that the Eleventh Amendment bars claims against a state for monetary relief under §1983 that are brought in federal court. The Court has never held that states have sovereign immunity from such claims brought, as this one was, in state courts. On the contrary, as Justice Marshall explained in his concurring opinion in *Employees v. Missouri Public Health Department*, 411 U.S. 279, 288 (1973) (Marshall, J., joined by Stewart, J., concurring):

> The common law doctrine of sovereign immunity . . . was modified *pro tanto* in 1788 to the extent that the States relinquished their sovereignty to the Federal Government. At the time our Union was formed, the States, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing, they simultaneously subjected to Congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress.

This Court recently confirmed that principle in *Atascadero State Hospital v. Scanlon*, ___U.S. ___, 105 S. Ct. 3142, 3147, n. 2 (1985), when it explained that the Eleventh Amendment issue presented in *Edelman* and other cases did not concern the "general immunity of the States from private suit. . . but merely the susceptibility of the States to suit before *federal tribunals*." (Emphasis in original.) After quoting with approval the views expressed by Justice Marshall in the *Employees* case, the Court stated: "It denigrates

the judges who serve on the state courts to suggest that they will not enforce the supreme law of the land." *Ibid.* This statement clearly indicates that states have no immunity from suits for monetary redress brought in state courts under §1983 or other federal laws, and that state courts are obliged by our federal system to enforce those federal rights.[2]

In sum, the issue presented—whether or not §1983 applies to Commerce Clause violations—is important principally to establish the entitlement of petitioners and the class they represent to refunds of taxes paid prior to filing suit. It is also significant, however, for purposes of recovering attorneys' fees under 42 U.S.C. §1988, which is an important aspect of the remedies fashioned by Congress for deprivations of federal rights under color of state law. As this Court noted in *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980): "Congress viewed the fees authorized by §1988 as 'an integral part of the remedies necessary to obtain compliance with §1983.' S. Rep. No. 94-1011, p. 5 (1976)."

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[2] In *Thiboutot v. State*, 405 A. 2d 230, 237 (Me. 1979), affirmed sub nom. *Maine v. Thiboutot*, 448 U.S. 1 (1980), also cited by respondents, the Supreme Judicial Court of Maine stated that sovereign immunity would bar a class claim for improperly withheld social security payments brought in state court under §1983. That conclusion was in error for the reasons stated in the text. Furthermore, that issue was not presented to or ruled on by this Court, which merely affirmed the Maine Court's holding that §1983 provides relief for Social Security Act violations and which actually ordered the State to pay the individual claimants amounts that had been withheld.

II. The Circuits Are in Direct Conflict Over The Application Of 42 U.S.C. §1983 To Commerce Clause Violations

Respondents are also incorrect in contending that there is no "genuine" conflict among the circuits with respect to the issue of the application of Section 1983 to Commerce Clause violations because the Third Circuit's holding in *Kennecott Corp. v. Smith*, 637 F. 2d 181 (3d Cir. 1980) that Section 1983 does apply to such violations was assertedly only dictum and was not discussed at length. The Third Circuit's holding was not dictum; it was the principal basis for the Court's holding, which was disputed by defendants, that the Anti-Injunction Act, 28 U.S.C. §2283, did not bar an injunction against a state proceeding that would allegedly violate the plaintiff's rights under the Commerce Clause. See 637 F. 2d at 186. The fact that the court also noted a second, alternative basis for that conclusion does not make its first and principal holding dictum. Even the court below recognized the decisions of the Third Circuit in *Kennecott Corp. v. Smith, supra*, and of the United States District Court in *Confederated Salish and Kootenai Tribes v. Moe*, 392 F. Supp. 1297 (D. Mont. 1975), aff'd, 425 U.S. 463 (1976) as "holdings going the other way." (Pet. App. 12a).

Nor is there any basis for respondents' suggestion that the Third Circuit's conclusion was not fully considered. It cited and correctly relied on this Court's decision in *Maine v. Thiboutot*, 448 U.S. 1 (1980), which, as noted in the Petition at p. 12, confirmed that §1983 encompasses violations of all federal con-

stitutional and statutory rights.[3] In this regard, moreover, respondents have not even addressed petitioners' showing (Pet. at 12-13) that the holding of the court below respecting Section 1983 conflicts squarely with this Court's decisions in *Maine v. Thiboutot*, supra; *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 725 (1977) and other cases.[4]

Furthermore, contrary to respondents' contention, whether Section 1983 applies to Commerce Clause violations is a recurring issue of the greatest importance. As noted by respondents themselves, the Tenth Circuit has recently joined the Eighth Circuit on this issue in conflict with the Third Circuit, and the issue is likely to recur in numerous cases challenging state actions as violative of the Commerce Clause. See *J. & J. Anderson, Inc. v. Town of Erie*, 767 F. 2d 1469, 1476-1477 (10th Cir. 1985).

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[3] The fact that the Third Circuit, like the United States District Court for the District of Montana in the *Confederated Salish and Kootenai Tribes* case, did not elaborate at length on this conclusion does not indicate that the issue was not fully considered; more likely, it simply reflects the fact that the conclusion is clearly required by the language of Section 1983 and this Court's decisions.

[4] Respondents also advance the astounding argument that Section 1983 should not be construed to apply to Commerce Clause violations because the courts had recognized the right of private litigants to seek judicial protection for such violations before 1871, when Section 1983 was enacted (Br. in Opp. at 7, n. 6). The courts had also recognized similar rights in respect of many other constitutional provisions, and respondents' argument, if accepted, would carve a very large exception from the protections provided by Sections 1983 and 1988, an exception which finds no support in this Court's cases.

III. The States May Not Disregard This Court's Decision In *Atchison T. & S. F. Ry v. O'Connor*, 223 U.S. 280 (1912)

Respondents acknowledge that this Court's decisions establish that the Constitution itself requires the return of taxes exacted under compulsion, but they insist that the criminal sanctions imposed by the State (up to six months in prison, $5,000 in fines and the loss of the privilege to operate vehicles in the State) did not sufficiently compel the tax payments for purposes of petitioners' constitutional entitlement to refunds. (Br. in Opp. at 7-9). They further acknowledge that these sanctions would constitute implied duress under this Court's decision in *Atchison T. & S. F. Ry v. O'Connor, supra*, but insist that this Court was merely fashioning general common law which state courts since *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) are free to disregard.

Respondents' argument is untenable. Justice Holmes was not merely fashioning general common law in the *Atchison* case; by determining the circumstances in which persons are entitled under the Constitution to the return of monies exacted by an unconstitutional state tax, he was clearly delineating the scope of the constitutional right itself and was thus articulating important federal constitutional principles.[5] In any event, whether the scope of citizens' constitutional remedies under *Carpenter v. Shaw*, 280 U.S. 363 (1930), *Ward v. Love County*, 253 U.S. 17 (1920) and other cases turn on the vagaries of each state's common law, as

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[5] That this is so is reflected in the fact that this and other courts have cited and followed the *Atchison* principle in cases decided after *Erie*. *See, e.g., Altvater v. Freeman*, 319 U.S. 359, 365 (1943).

respondents contend, is itself an exceedingly important issue warranting this Court's review.

CONCLUSION

This Court should grant the petition for a writ of certiorari to review the judgment of the Supreme Judicial Court of Maine in this case.

Respectfully submitted,

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April 1986

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SUPREME COURT OF THE UNITED STATES

PRIVATE TRUCK COUNCIL OF AMERICA, INC., ET AL. *v.* RODNEY S. QUINN, SECRETARY OF STATE OF MAINE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MAINE

No. 85–1423. Decided May 19, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, with whom JUSTICE BRENNAN and JUSTICE O'CONNOR join, dissenting.

In this case, the Supreme Judicial Court of Maine held that an allegation that a State has violated the Commerce Clause is not cognizable in an action under 43 U. S. C. § 1983. This decision, while supported by the weight of authority, see, *e. g.*, *Consolidated Freightways Corp.* v. *Kassel*, 730 F. 2d 1139 (CA8), cert denied, —— U. S. —— (1984), conflicts with the holding in *Kennecott Corp.* v. *Smith*, 637 F. 2d 181, 186, n. 5 (CA3 1980). I would grant certiorari to resolve this conflict.

This case also presents the question whether persons subjected to an unconstitutional tax, the nonpayment of which is a crime, may bring a refund action under the Fourteenth Amendment if no state refund procedure is available. The Supreme Judicial Court recognized that the Fourteenth Amendment may require a refund of unconstitutional taxes paid under compulsion. See *Carpenter* v. *Shaw*, 280 U. S. 363, 369 (1930); *Ward* v. *Board of County Commissioners*, 253 U. S. 17, 24 (1920). However, the court rejected the "implied duress" theory of *Atchison, T. & S. F. Ry.* v. *O'Connor*, 223 U. S. 280, 286 (1912), and held that petitioners have no right of recovery under the Fourteenth Amendment because they failed to present evidence that the State actually threatened them with arrest or seizure of personal property if they failed to pay the tax in question. Because

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this holding calls into question the continuing vitality of *Atchison*, I would grant certiorari on this issue as well.